No. 14748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

ARTHUR G. BARNETT
1304 Northern Life Tower
Seattle 1, Washington
Attorney for Appellant

No. 14748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

ARTHUR G. BARNETT
1304 Northern Life Tower
Seattle 1, Washington
Attorney for Appellant

INDEX

TABLE OF CASES

TABLE OF CASES (Continued)

STATUTES AND AUTHORITIES

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction (R 9-12) on five Counts under a ten Count indictment (R 3-5 incl.) charging violation of 2 U. S. C., Section 192. The judgment was entered on the 25th day of

March, 1955 (R 9-12). Notice of appeal was filed March 25, 1955 (R 13). The District Court had jurisdiction under Title 18 U. S. C., Section 3231. Jurisdiction of this court is conferred by 28 U. S. C., Section 1291.

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2 U. S. C. 192, R. S. 102, as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

STATEMENT OF THE CASE

Appellant was found guilty of contempt of Congress under 2 U. S. C., Section 192, for his failure to answer the questions represented by Counts 1, 2, 8, 9 and 10 (R 10). He was sentenced to six months imprisonment, suspended, and $250.00 fine. The Court dismissed Counts 3, 4, 5, 6 and 7 (R 180). All counts are set forth also in Argument, page 44-45 of this brief. The appellant was a witness before the House Un-American Activities Committee hearing held in Seattle, Washington, on the 14th day of June, 1954, Representative Harold H. Velde, Chairman.

The hearing in which the appellant and other witnesses testified was subsequently printed by the Committee and contained in a pamphlet entitled "Investigation of Communist Activities in the Pacific Area—Hearings Before the Committee on Un-American Activities, House of Representatives, 83d Congress, 2d Session, June 14th and 15th," and is Defendant's Exhibit No. A-4, pamphlet No. 4. Defendant's Exhibits A-1, A-2, A-3 and A-5 contain frequent references to appellant's alleged communist connections and activities and possible identification with communist leaders, some of whom are convicted Smith Act defendants, and consist of similar pamphlets published by the Committee and containing references to other testimony acquired by the Committee at other hearings

on Pacific Area communism, and excerpts concerning appellant have been condensed in Appendix "A". Appellant's Exhibit A-14-A (R 114, 163) is a transcript taken from a tape recording of the examination of appellant at the hearing and was furnished by appellant as a literal transcription of what actually happened, to show the atmosphere and setting which resulted in some confusion reflected by some material errors which appellant stated would be pointed out (R 81). Plaintiff's Exhibit No. 7 (R 28-29) is a printed pamphlet being House Report No. 2471 and is only an excerpt of the part of appellant's examination used as a basis for appellant's contempt citation. Plaintiff offered no exhibit containing the entire examination of appellant. Throughout this brief appellant will cite to pages of the record containing defendant's Exhibit A-14-A (R 114, 163) as being a more accurate and complete record of what took place, in addition to showing the atmosphere and setting. In addition appellant placed in evidence Defendant's Exhibit No. A-14 (R 81, 82, 114) being a tape recording of the actual hearing.

Appellant had been mentioned in testimony before the Committee by Barbara Hartle, a convicted Smith Act defendant, as an active member of the Communist Party, being further identified with certain labor organizations allegedly dominated by communists. (Defendant's Exhibit A-2, pages 6067, 6094 (R 38, 39, 41-47, 52-58); Defendant's Exhibit A-3, page 6232 (R 38, 39, 41-47, 52-58); Appendix "A".) Likewise appellant was mentioned by other admitted former active

communists (Appendix "A"). Counsel for the Committee advised appellant that he had been identified as an active member of the Communist Party (R 106).

Out of approximately 67 questions, appellant answered all but 22, 10 of which were made the basis for the indictment. The trial court felt that appellant had gone before the Committee to afford as much information and answer as many questions as he properly could and that appellant did not come before the Committee with a preconceived notion of contempt for it or contempt for the Government, or Congress (R 191).

The case was tried before the court without a jury at the request of the defendant (R 7). Exhibit A-14, the tape recording, reflects what took place, the spirit of the Congressmen as well as of the witness. It is hoped that the appeal court will listen to this record. Appendix "B" consisting of excerpts from defendant's Exhibit A-4 and A-5, together with testimony (R 40) shows that the hearing was held in the presence of apparatus consisting of television cameras, microphones and constant "flash" photographers. Appendix "B" shows the constant harrassment of, and protests by, numerous witnesses and the reluctance of the Committee members to maintain a quiet and orderly hearing.

The basis for appellant's reasonable apprehension is shown, not only by some of the Committee questions,

but also by newspaper articles represented by defendant's Exhibits A-6 to A-10, inclusive, starting in the year 1941. Except for a photograph of appellant in one of these articles all are reproduced for convenience in Appendix "C." The State of Washington, 1947 Legislature, authorized a legislative investigation into un-American activities, commonly known as the Canwell Committee; the appellant was constantly mentioned throughout the hearings of this Canwell Committee by many witnesses and ex-communists (Defendant's Exhibit A-11 appearing in Appendix "D"). Defendant's Exhibit A-13 consists of a certified transcript of appellant's University of Washington record and was put in evidence because counsel for the Committee advised appellant that witnesses before the Committee had identified appellant as an organizer for the Communist Party at the University of Washington. The transcript shows attendance at the University of Washington and covers years "since 1935."

The questions involved and set forth substantially in the Specification of Errors and Arguments, are:

1. Whether under the Fifth Amendment the appellant:

   (a) Was denied due process in that he did not have a fair hearing,

   (b) Was denied due process in being deprived of liberty, or property, without due process,

(c) Was held to answer in a public hearing for a capital, or otherwise infamous crime.

2. Whether or not under *2 U. S. C., Section 192,* plaintiff has proved beyond a reasonable doubt the appellant's criminal intent in that appellant deliberately and intentionally refused to answer the questions covered by Counts 8, 9 and 10 under the conditions of the hearing.

3. Whether as to Counts 2 and 8, as a matter of law, and in view of the recent decisions of the Supreme Court in *Quinn v. U. S., Bart v. U. S., Emspak v. U.S.,* 99, L. Ed., (Adv.) June 6, 1955, the appellant should be acquitted for failure of the Committee to direct appellant to answer the question.

4. Whether the questions represented by Counts 1 and 2, respectively, to-wit: "Will you tell the Committee please, briefly, what your employment record has been since 1935?" and "How were you employed in 1948?," gave the appellant basis for feeling reasonably apprehensive that the answers to said questions would:

(A) Tend to incriminate him or furnish a link in a chain of evidence to incriminate him;

(B) Constitute a waiver of his privilege under the Fifth Amendment to the Constitution of the United States.

5. Whether or not Counts 1 and 2 should have been

dismissed because in context and time they are related to dismissed Count 3; Count 1 also being related in context and time to dismissed Counts 4, 5 and 6.

6. Whether the court (R 160) with respect to Counts 1 and 2 has put too heavy a burden on appellant beyond that of reasonable apprehension in requiring appellant as a lay witness to know by his own knowledge that the Committee merely wanted general information.

7. Whether as to Counts 8, 9 and 10 appellant was entitled to be apprehensive of waiver where there were repeated attempts to entrap and bait appellant, and repeated assurances to the appellant that he had previously waived his privilege.

8. Whether or not after an answer which gave a lengthy explanation of the appellant's work (R 108), and which was clearly not pertinent, with respect to related questions asked immediately thereafter (R 108-112 incl.) involving questions pertinent on their face because they were phrased to involve the use of terminology involving communism, the appellant had a right to "stop short" and be apprehensive as to waiver; whether thereafter the continued questions on the same subject, in context, became pertinent so as to justify the District Court in its refusal to dismiss as a matter of law Counts 8, 9 and 10; did the Congressional Resolution, (plaintiff's Exhibit 2; Pub. Law 601) (R 19)

authorize the inquiry behind said questions in Counts 8, 9 and 10.

9. Whether or not in view of the fact that the Committee already had in its files the answers to questions represented by Counts 8, 9 and 10 they were insignificant in terms of legislative evaluation.

10. Whether or not it was necessary for the appellant under the evidence, to show "employment" by the Communist Party, as suggested by the trial court (R 174-177) in order to claim the privilege as to Counts 1 and 2.

SPECIFICATION OF ERRORS

I

The District Court erred in its failure to find that appellant was deprived of his rights under the Fifth Amendment in that he was deprived of a fair hearing, was deprived of his liberty and property without due process, and was being held to answer under the guise of a legislative investigation for capital, or otherwise infamous crimes contrary to the provisions of the Fifth Amendment.

II

The District Court erred in its failure to find as to Counts 1, 2, 8, 9 and 10 that the refusal of the appellant to answer under the circumstances surrounding the hearing was justified and in its failure to find that

the plaintiff had not proved beyond a reasonable doubt that appellant's refusal was a deliberate, intentional, capricious and arbitrary refusal, constituting criminal intent as required by Title 2, Section 192.

III

The District Court erred as a matter of law as to Counts 2 and 8 in failing to find that the appellant should be acquitted for failure of the Committee to direct the appellant to answer the question.

IV

The District Court erred in holding that the appellant had waived his Constitutional privilege against self incrimination with respect to the questions on which Counts 8, 9 and 10 of the indictment were based by having answered routine identification questions involving non-incriminating matters. (R 167, 168).

V

The District Court erred in its failure to find under the evidence that the Committee already had the answers in its records and files to the questions represented by Counts 8, 9 and 10 and that its purpose in asking said questions was in context with Count 7 and was but another repeated effort by the Committee to force the witness into waiver; that aside from waiver and threat of perjury charges, the answers in themselves were not pertinent.

VI

The District Court erred with respect to Counts 1 and 2 in ruling that the questions did not call for incriminating information which might form a "link in a chain of evidence" and in holding that appellant must prove "employment" by the Communist Party to avail himself of the privilege (R 174-177).

VII

The District Court erred in failing to find under the evidence:

1. That the appellant was justified in feeling reasonable apprehension as to Counts 1, 2, 8, 9 and 10;

2. That the answers to questions involved in Counts 1, 2 (R 174), 8, 9 and 10 would tend to incriminate him or furnish a link in a chain of evidence which would tend to incriminate him;

3. That the answers would expose him to charges of perjury on matters beyond his control, (R 168-169) (R 86);

4. That answering Counts 1, 2, 8, 9 and 10 might constitute "waiver."

VIII

The District Court erred in refusing to dismiss Counts 1, 2, 8, 9 and 10 and in holding that the claim of privilege against self incrimination was not properly in-

voked and that true answers to the questions in said counts did not reasonably involve any threat of self incrimination, and that the appellant was required under existing law to have answered. (R 180).

IX

The District Court erred after dismissing Counts 3, 4, 5 and 6 in its failure to find that Counts 1 and 2 were in context a part of the question represented by Count 3 and refusing to likewise dismiss Counts 1 and 2.

X

The District Court erred in ruling that the appellant did not have a right to "stop short" as to Counts 8, 9 and 10 when a further answer might involve incriminating matter, especially when these counts were related to dismissed Count 7 and were rephrased to delete references to the Communist Party (the court so stated as to Count 8, [R 162]); and especially so when "waiver" was being sought by the Committee; and further, when such questions were not related to a legislative purpose, involved answers of minor value, and which to a large extent the Committee already had.

XI

The District Court erred in substituting for reasonable apprehension by the appellant a positive duty to know absolutely that an answer to the questions in Counts 1 and 2 would not incriminate or tend to incriminate, especially in view of the uncertain state of

the law regarding waiver if any answers be given.

XII

The District Court erred in ruling that the questions represented by Counts 8, 9 and 10 were pertinent to a legislative inquiry.

XIII

The District Court erred in its failure to find under the evidence that the Committee already had the answers in its records and files to the questions represented by Counts 8, 9 and 10 and that its purpose in asking said questions was in context with Count 7 and was but another repeated effort by the Committee to force the witness into waiver; that aside from apprehension of waiver and possible perjury charges, the answers in themselves were not pertinent other than for further identification, matter that had all been secured early in examination of the witness.

SUMMARY OF ARGUMENT

Under the conditions of the hearing appellant was deprived of his rights under the Fifth Amendment to:

1. A fair hearing.

2. Not be deprived of his liberty and property without due process of law;

3. Not be held to answer for capital and infamous crimes contrary to the provisions of the Fifth Amendment.

The plaintiff failed to prove beyond a reasonable doubt that appellant's refusal to answer was the deliberate intentional refusal constituting criminal intent required under Title 2 U. S. C., Section 192.

The Committee failed to direct the appellant to answer Counts 2 and 8.

The appellant properly claimed his privilege not to testify against himself; he did not waive his privilege by giving non-incriminating answers; further, that answers to non-pertinent identification questions did not constitute waiver as waiver is defined in contempt hearings so as to hold the appellent in contempt for not further answering; especially so where the questions were not asked in good faith and were for harassment and exposure; and furthermore, that the appellant was justified on account of the attitude of the Committee to be afraid and to give up answering on non-pertinent matters because of the harassment; and such refusal is not contempt as defined under Title 2, Section 192.

The privilege was properly invoked as to Counts 1 and 2 which were in context with dismissed Counts 3, 4, 5 and 6 as to time and subject matter; furthermore, the statements of Committee counsel is clear proof that the purpose of the Committee was to get testimony involving alleged Communist activities of the appellant, his testimony regarding matters "since 1935,"

that said matters could have exposed appellant to possible perjury charges involving persons and details as much as 19 years old.

The trial court was not justified in substituting for reasonable apprehension a duty on the part of the appellant to know what the Committee had in mind as to Counts 1 and 2.

As to Counts 8, 9 and 10, the answers called for could in no way be pertinent to the question under inquiry as defined under the statute, to wit: House Resolution No. 5, being plaintiff's Exhibit 2, Law 601, 2d Session, 83d Congress. These questions were not only not pertinent on their face but after an answer by appellant describing his occupation (R 108) the further questions thereon were clearly no longer pertinent.

For appellant to have answered the questions involved in Counts 8, 9 and 10 about his office, his business associates, and the name of the group would, under the television, radio and newsreel conditions of the hearing have deprived him and his associates of property rights by exposing them to the opprobrium which the Committee was deliberately fostering; it would have been damaging and devastating to their business. This would have occurred without due process protection and without the equal right to answer charges under the same facilities.

The risk of perjury following conflicts in detailed testimony of other witnesses, together with a new apprehension which is appearing in the law, to wit: apprehension of waiver, are themselves great risks which no court should compel appellant to run in order to invoke Constitutional restraints designed to control despotic actions by an arm of the government.

Finally, the courts must not retreat from their positive duty to judicially review the methods, conduct and acts of this arm of government when the rights of citizens are infringed upon; that whereas the President and the Executive Department, and the Judiciary, find it possible to protect themselves in terms of the separation of powers, it is becoming more difficult for citizens to be protected against Congress using convenient formulas of national welfare, anti-subversion or anti-communism to support its ever-widening assaults. The courts must compel Congressional Committees which in effect carry on trials, usingthe powers of subpoena, and punishment by "exposure" and publicity, to furnish due process to the individuals being summoned before such committees.

ARGUMENT

SPECIFICATIONS OF ERROR NUMBER 1 AND 2 (APPELLANT DEPRIVED OF (a) FAIR HEARING, (b) OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS, AND (c) HELD TO ANSWER FOR INFAMOUS CRIME—ALL CONTRARY TO THE

FIFTH AMENDMENT; AND ERROR 2: REFUSAL WAS JUSTIFIED BECAUSE OF "SETTING.")

(a) WAS THE APPELLANT DEPRIVED OF A FAIR HEARING—Despite evidence in the Committee record and published by the Committee (Defendant's Exhibit A-3, and excerpts in Appendix "A") that appellant was an ex-communist with reason for apprehension in the Committee hearing, the Committee treated him in a hostile and accusatory fashion.

Defendant's Exhibit A-3, being Pamphlet Part 3, Page 6232 (App. "A") contains the following answer to the Committee by convicted Smith Act defendant, Barbara Hartle:

> "Mrs. Hartle: . . . When Harvey Jackins was expelled, I heard a discussion seriously held as to what his wife would do—go with him to the "enemy" or stay with the party. The Jackins have 3 or 4 children . . ."

Other witnesses had identified him before the Committee during the course of the hearing and in executive session (R 41-47). See Exhibit A-2, (App. "A,") Pamphlet, Part 2, Page 6067 and Page 6094. Also see Exhibit A-1, (App. "A,") Pamphlet, Part 1, Page 6027 and Page 6003-6004.

Appellant put in evidence Exhibits A-6 to A-10, consisting of newspaper articles, (Appendix "C,") one of which contains a photograph of appellant Jackins and all imputing to the appellant communist activities run-

ning from March 28, 1941, through January 16, 1948. In addition, appellant's Exhibit A-11 (R 73-75) consists of photostats of pages from a report by the Canwell Committee, an authorized committee of the 1947 legislature of the State of Washington investigating un-American communist activities. These photostatic excerpts mention and describe appellant Jackins as a member of the Communist Party and identify him with numerous named communists (Appendix "D").

Counsel for the Committee also stated:

> "Mr. Chairman, it is my purpose to inquire of this witness as to what knowledge he had regarding Communist Party activities in connection with certain unions of which he was a member or had official positions with. . . ." (R 94).

The above is set forth here to show that appellant had much to fear. His efforts to protect himself under the Constitution can be understood in the light of the above. Consequently, the reception he received from the Committee in the light of the above shows an unfair hearing, harassment, and a studied effort to submit appellant to opprobrium before a wide television and radio audience.

The Committee addressed the appellant:

> "Mr. Clardy . . . (R 91) And I am sure he is not claiming it in good faith but is attempting merely to filibuster and to follow the usual Communist Party line and now I ask that he be directed to answer."
>
> . . .

"Mr. Clardy . . . (R 92) And we don't care for any thanks or anything else from you."

. . .

"Mr. Jackson . . . (R 93) It is quite obvious that the witness has no intention of answering any questions which have to do with his alleged membership in the Communist Party; and I think it is simply a waste of time of the Committee and of the audience to pursue it any further. As far as I am concerned you can ask him the question now and excuse him from the stand."

. . .

"Mr. Velde . . . (R 94) Are you a member of the Communist Party?"

. . .

"Mr. Velde . . . (R 94) Have you ever been a member of the Communist Party?"

. . .

"Mr. Scherer . . . (R 97) Witness, isn't it a fact that you were expelled from all three of these unions because of your Communist Party activities within the unions? Isn't it a fact?"

. . .

"Mr. Scherer . . . (R 97) Were you on the Communist Party payroll?"

. . .

"Mr. Scherer . . . (R 97) Isn't it a fact that you have refused to answer the questions as to your previous employment because you were on the payroll of the Communist Party in this country during those years?"

. . .

"Mr. Scherer . . . (R 98) All right, Witness, tell me what part of the statements I have just made

are false then?"

. . .

"Mr. Clardy . . . (R 98) Was there any reason, other than that cited by Mr. Scherer, for your expulsion from those three unions?"

. . .

"Mr. Clardy . . . (R 98) Did you ever engage in any espionage activities for the Communist Party, Witness?"

. . .

"Mr. Clardy . . . (R 98) You mean you won't even answer the question whether or not you have engaged in any espionage activities? Is that correct?"

. . .

"Mr. Jackson . . . (R 99) Would a true answer to that question tend to incriminate you? Would a true answer to the question as to whether or not you have ever engaged in espionage activities tend to incriminate you?"

. . .

"Mr. Jackson . . . (R 99) Yes, we understand the provisions of the Fifth Amendment very well. We learned it before you learned your lines on it. The question is, Would a truthful answer to the question whether or not you have ever committed espionage tend to incriminate you?"

. . .

"Mr. Doyle . . . (R 99-100) Were you excused during those years for any reason from military service, or why didn't you serve? Would that incriminate you, too, if you told the truth in that regard?"

. . .

"Mr. Jackson . . . (R 104) Which judgment will be passed again comes the revolution. That we are trying to prevent."

. . .

"Mr. Tavenner . . . (R 106) Have you ever been a member of the Communist Party?"

. . .

"Mr. Clardy . . . (R 110) Have you ever been a member of any organization whose avowed purpose is to overthrow this Government through the use of force and violence?"

. . .

"Mr. Doyle . . . (R 113) Well, do you have one on you? Will you please give it to counsel? You carry a business card, don't you? A professional card? Why don't you answer honestly on that?"

Coupled with the next examples of the Committee's work set forth below involving efforts to entrap the witness into waiver, the record makes one of the most shocking spectacles of an unfair hearing that could come before any Circuit Court.

After exercising his privilege as to the question represented by Count 1, which inquired as to appellant's employment record "since 1935," and after a direction from the Committee to answer the question, the Chairman of the Committee, Mr. Velde, stated:

"Mr. Velde . . . (R 85) Certainly, that is a very simple question and the Chair *sees no way in which that would incriminate you to answer it* whatsoever, and you are directed to answer the question, sir." (Emphasis added.)

The question was asked approximately *6 times* (R 85-87) during the course of which Mr. Velde also stated:

> "Mr. Velde . . . (R 86) Mr. Witness, the *testimony of the previous witness has nothing to do with your testimony whatsoever.*" (Emphasis added.)

On the fifth asking by Mr. Velde, he asked the appellant . . . "You still refuse to answer upon the grounds of the Fifth Amendment? Is that correct?" The witness replied, "I have answered that very clearly, Mr. Chairman." Mr. Velde then replied:

> "Mr. Velde . . . (R 87) Now, how do you mean that you have answered very clearly? By refusing to answer? *Can you tell me of one way in which your previous employment*—I mean giving us the benefit of your previous employment—*could incriminate you?*" (Emphasis added.)

These assurances by the Chairman that there would be no link in a chain of evidence furnished by the answer, and his request to the appellant to show in one way how the answer could incriminate the appellant, is certainly entrapment at its worst.

Although Counts 3, 4, 5, 6 and 7 were dismissed, still they must be examined to note the continuation of the tactics which constitute further proof of the unfair nature of the hearing. On Count 3 the appellant offered to discuss the subject but not under oath before the Committee. This offer became the subject of a claim of waiver by Mr. Clardy (R 89-90). Later (R 91)

Mr. Velde and Mr. Clardy engaged in a discussion as to whether or not the offer of the appellant to discuss the subject before an audience but not under oath was or was not a waiver. The Chairman said it was not and Mr. Clardy said it was.

When the appellant claimed his privilege to the question asked in Count 4, the Chairman directed him to answer the question and stated (R 95):

> "The Chair can see *no reason why the answer to* such a question *should incriminate you in any way.* You are directed to answer the question." (Emphasis added.)

The District Court at the trial below upheld the privilege and was thus in agreement with the appellant and in disagreement with the Chairman, Mr. Velde.

To a question intervening between Count 5 and Count 6 (R 96) "Were you . . . expelled from Lodge 751 . . . ," the Chairman, Mr. Velde, again directed the appellant to answer and stated:

> *"Again the Chair, and* I am sure the *members of the Committee, sees no reason why you could possibly be incriminated by an answer* to that question . . " (Emphasis added.)

Then follows questions about the Communist Party, membership, being on the payroll, being expelled from three unions for Communist Party activities, espionage, as set forth above.

When the appellant answered (R 107) a question proposed by Mr. Clardy which involved an answer describing the appellant's occupation, at the conclusion Mr. Clardy asked (R 108):

> "Mr. Clardy . . . May I ask you who do you mean by "we"? Is this something originated by the Communist Party as part of its program."

Again the appellant is assured that there can be no possible incrimination. Nothing is said about furnishing a link in a chain of testimony nor about an invitation to perjury. The record discloses (R 109) audience laughter, and the Chairman admonishes the audience. Then Mr. Clardy asked that the Chairman direct the appellant to answer the last question, but Mr. Velde stated that he was sorry he didn't remember the last question and requested the reporter to read it. Note the confusion out of which Counts 7 and 8, and, by context, 9 and 10 are grounded.

Thus Mr. Clardy asked (R 108) "May I ask you, who do you mean by 'we'? Is this something originated by the Communist Party as a part of its program?" The reporter read back "Is this something which originated by the Communist Party as a part of its program?" And Mr. Clardy asked that the witness be directed to answer that question. The privilege was again claimed. According to defendant's Exhibit No. A-14-A, Mr. Clardy asked (R 110): "Who are the other

people then when you used that word "they" that are associated with you in this movement?" And this was made the basis for Count 8.

Defendant's Exhibit No. A-14-A is a transcript of the tape recording of the radio broadcast of the hearings.

If we note that defendant's Exhibit No. A-14-A shows that the question represented by Count 8 was by its variance in "we" and "they" not asked at all, it creates even more confusion.

Then followed a question by Mr. Clardy (R 110): "Very well. Are those that you associate with the persons that have been identified in this proceeding as members of the Communist Party?" Here again we have an invitation to waiver, to perjury charges. Does appellant know all the persons "identified in this proceeding"? What proceeding?

There was unfairness involved in the Committee's attempt to manipulate appellant's answers into "waiver."

Mr. Doyle (R 111) advised the appellant that he had waived his privilege under the Fifth Amendment by answering on his occupation. With Mr. Doyle's assurance that there had been a waiver, there is validity to appellant's being alarmed and frightened over the prospect of waiver. At the conclusion of the appel-

lent's long explanation on his employment it was Mr. Clardy who introduced the subject of communism (R 108). This introduced a danger in discussing the subject of communism. In fact, the appellant's fear looks well founded in terms of the assurances he later received from Mr. Doyle that there had been a waiver. Because of the tactics and the unfair nature of the hearing and the efforts to entrap the appellant into waiver, can it be said that there was present the willfulness required under the statute in the failure of the appellant to answer the questions represented by Count 9, "But what is the name of the group?," and Count 10, "Does the group that you referred to have an office with you in the same office that you work in?"

The statement of the appellant (R 111-112) following Mr. Doyle's statement that he had waived his privilege is quoted here for purposes of comparison with the most famous English case. The appellant stated:

> Mr. Jackins:
> "Sir, I believe that the Committee has sought to involve me in a trap on this question."
>
> Mr. Jackins:
> "Were I to decline to answer the question, certainly it is conceivable that I will be threatened with contempt charges. On the other hand, to answer it would lead to all sorts of other involvements as I have tried to explain previously so that in the circumstances I have no choice but to de-

cline to answer the question, invoking my privileges under the Fifth Amendment to not bear witness against myself."

Wigmore (*VIII Wigmore on Evidence* (*3d Ed.*) 291, Sec. 2250) discusses the great English case of John Lilbourn which led to the ~~appellation~~ abolition of the Star Chamber Court and crystallized the privilege in England. He cites Lilbourn as stating at his trial:

> "I am not willing to answer you any more of these questions because I see you go about this examination to ensnare me, for seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and, therefore, if you will not ask me about other things laid to my charge I shall answer no more; . . . and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think *by the law of the land*, that I can stand upon my just defense and not answer to your interrogatories." (Emphasis added).

As a result of Lilbourn being whipped and pilloried the whole of England became incensed at the indecency and the torture. Within ten years his complaint to Parliament resulted in the House of Lords ordering that the sentence "be totally vacated, as illegal and most unjust, *against the liberty of the subject, the law of the land, and Magna Charta*," and he was allowed 3000 pounds in reparation. (Emphasis added).

Lest it be overlooked,appellant notes that in the *Lilbourn* case the legislature stopped the inhuman practice by the courts. The issue before the court in the in-

stant case is quite the reverse. Our court is being asked to restrain the legislature. The history of the United States Legislature for several decades has revealed constant and continual erosion of civil liberties of citizens. There is a clear unwillingness of the judiciary to interfere. The error is the assumption that the United States Government is comprised of either the legislature on the one hand, or the executive on the other hand, instead of keeping firmly in mind that the judicial and the legislative and the executive each comprise coequal and independent branches of what is the United States Government. This error appears in *Emspak v. U. S.*, infra, page 591, where it is stated:

". . . the Government expressly conceded." The phrase "Government" is used constantly throughout the *Emspak, Quinn* and *Bart* cases, infra, instead of "plaintiff" which is the executive arm representing the legislative.

There has been a too easy presumption that a Legislative Committee is in good faith seeking information for legislation purposes if they so claim.

The constitutional restraints in the Bill of Rights for the protection of the individual against the legislative are difficult to secure because of this broad presumption plus a formula in a Congressional Resolution reciting something about "subversion," etc.

Mr. Justice Reed dissenting in *Quinn v. United States,* supra, page 582, states: "In the context of this testimony, the adoption by Mr. Quinn of Mr. Fitzpatrick's reference to the First and Fifth Amendments smack strongly of a 'due process' Fifth Amendment claim." In the instant case appellant does not just suggest but actually claims lack of due process.

Although we are involved in discussing Specification of Error No. 1, the discussion of whether or not appellant was accorded a fair hearing now leads us directly into a discussion of SPECIFICATION OF ERROR NO. 2.

In *U. S. v. Kleinman* (1952), 107 F Supp. 407, the court, in discharging defendants indicted for contempt for refusal to answer questions of a Senate Committee investigating organized crime, said:

> "When the power of the court to punish is invoked, it necessarily follows in order properly to determine the guilt or innocence of the accused, that the court must examine the entire situation confronting the witness at the time he was called upon to testify. Only thus can it be determined whether his refusal was capricious and arbitrary and therefore a willful, unjustified obstruction of a legitimate function of the legislature or was a justifiable disobedience of the legislative command . . .
>
> In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with concomitant

flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again.

Under the circumstances clearly delineated here, the court holds that the refusal of the defendants to testify was justified and it is hereby adjudged that they are not guilty."

In *Aiuppa v. U. S. (1952)*, 201 F. 2d 287, 300, the Court in reversing a judgment directing an acquittal of an appellant for refusal to answer questions of a Senate Crime Investigating Committee, said:

". . . we are unable to give judicial sanction, in the teeth of the Fifth Amendment, to the employment by a committee of the United States Senate of methods of examination of witnesses constituting a triple threat: answer truly and you have given evidence leading to your conviction for a violation of Federal Law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment. In our humble judgment, to place a person not even on trial for a specified crime in such a predicament is not only a manifestation of unfair play, but is in direct violation of the Fifth Amendment to our national Constitution."

Mr. Justice Brandeis in *Journey v. MacCracken,* 294 U. S. 125, 147-48, 150 (1935) declared that any fear that Congress might abuse its powers is "effectively

removed by the decisions of this Court which hold that assertions of Congressional privilege are subject to judicial review."

The Notre Dame Lawyer (Vol. XXIX, No. 2, (Winter 1954), page 257), published 5 articles containing addresses delivered at a symposium on safeguards for witnesses at legislative investigations. The article by *Telford Taylor, "Judicial Protection Against Abusive Practices,"* states:

> "The courts will undoubtedly hold that such efforts to conclude a legislative inquiry into a tribunal for the trial of criminal charges violate the doctrine of separation of powers, and that the witness (quite apart from the privilege against self-incrimination) could not be required to answer."

That the courts are being pressed to recognize and curb abhorrent practices of legislative committee investigations appears from the following: In *U. S. v. Charles Nelson*, 208 F 2d 505, 512, 513, the Court of Appeals, speaking through Judge David Bazelon, held:

> "Nelson's freedom of choice had been dissolved in a brooding omnipresence of compulsion. The committee threatened prosecution for contempt if he refused to answer, for perjury if he lied, and for gambling activities if he told the truth . . .
>
> . . . If there is anything to suggest that a Congressional Committee's hearing is less awesome than a police station or a District Attorney's office, and should therefore be viewed differently, it has escaped our notice. The similarity has become more apparent as 'investigated' activities of Con-

gress have become less distinguishable from the law enforcement activities of the Executive."

A *Tulane Law Review* article entitled *"Congressional Investigations: Rights of Witnesses,* Vol. 26, page 381, at page 387, somewhat summarizes the gathering weight of opinion which the courts must begin to recognize in the following language:

> "Few persons contend that the courts should prescribe rules of procedure for the conduct of Congressional hearings. On the other hand, it is difficult to conceive how a witness can be found in contempt or sentenced for a criminal offense for refusing to acquiesce to demands and conditions which infringe his recognized rights and which hold little promise of a compensating advantage to the governmental process. Since the risk which is inherent in a refusal to comply with an order of a Congressional Investigating Committee will deter frivolous assertions of rights, there would appear to be no valid reason for refusal to recognize a defense based upon prejudicial conduct of a hearing.
>
> Furthermore, most of the deficiencies and excesses of Congressional hearings can be corrected by the investigators themselves. However, the courts should not criminally punish a witness who has withheld impertinent or privileged information or who has refused to answer questions which are asked under conditions that render them unreasonable."

Reference is again made to the gathering weight of opinion in an article by *William T. Gossett*, Vice President and General Counsel of the Ford Motor Co., in 38 A. B. A. J. 817 entitled "Are We Neglecting Constitu-

tional Liberty? A Call to Leadership."

> "Congressional investigations which delve into matters of personal conduct assume the aspect of a trial and thus abridge the rights of individuals, guaranteed by the Constitution."

Extended portions of this important article are included in the Appendix to this brief (Appendix "F").

Consider too the following comments by *Erwin N. Griswold* in *"The Fifth Amendment Today"* (Harvard University Press, 1955, Library of Congress, Catalogue Card No. 55-6809). Mr. Griswold is Dean and Langdell Professor of Law, Harvard Law School.

> "When we come to legislative investigations, however, we have a wholly different situation. Here, nearly every safeguard which has been developed over the centuries by our courts is thrown out the window. We are told that a legislative committee is not a court, and that court rules do not apply. We are told too that a committee or sub-committee is only conducting an investigation, not a trial, and that Congress or a legislature would be severely hampered in its law-making function if it were bound by cumbersome court rules. The situation is surely different. Indeed, experience has taught us that the risks are very great in legislative investigations, which might suggest that this was a place where even greater safeguards should be imposed. At any rate none of the reasons given would seem to be an adequate ground for not recognizing that the rights of the individual, established after so long a struggle, are just as precious before a legislative body as they are in court. (Page 62, 63).

Mr. Griswold discusses the two phrases "the law of

the land" and "due process of law," indicating that the purpose of these provisions was to protect the subject from oppressive uses of authority, and quotes from Lord Coke:

> "Every oppression against law, by colour of any usurpt authority is a kind of destruction, . . .: and it is the worst oppression that is done by the colour of justice." (Coke, Second Institutes, 1656, P. 48).

Griswold continues to show (page 37) that perhaps the essential thought behind due process is that it has some application wherever men feel a sense of injustice.

> "Thus it becomes a chief source of support for individual liberties. What is liberty? Is it not freedom or protection of the individual against arbitrary or improper exercise of the organized power of the state? What is a tyrant? Is he not a man who exercises the collective power of the state in an arbitrary, capricious, or purely selfish manner? Such words as 'arbitrary' and 'capricious' are difficult words. They may not in fact mean much more than 'unreasonable' and that in turn may mean in substance 'not customary' or not what we are accustomed to. Perhaps it may be said that we are accustomed to decent treatment from our public officers, an that our hearts and minds recoil when that custom is broken. It is with this sort of thing that the idea of due process, of 'the law of the land' is concerned . . .
>
> I think it fair to say that a large section of the public has from time to time felt 'a sense of injustice' with respect to some of these hearings; and if they have, then there is a situation where the ancient ideal of due process is involved. A failure to appreciate the intimate relation between sound

> procedure and the preservation of liberty is implicit, may I say, in that saddest and most short-sighted remark of our times: 'I don't like the methods, but . . .' for methods and procedures are of the essence of due process, and are of vital importance to liberty. As Mr. Justice Brandeis wrote some 30 years ago, 'in the development of our liberty insistence on procedural regularity has been a large factor' *Burdeau v. McDowell,* 256 U.S. 465, 477 (1921). More recently Mr. Justice Frankfurter has put the same truth in these words: 'The history of liberty has largely been the history of observance of procedural safeguards'. *McNabb v U.S.* 318 U.S. 332, 347 (1943).

Mr. Griswold continues, page 41, that the election of a man to Congress does not make him a magistrate nor vest him with any power over his fellow citizens. And that the power of investigation belongs to the collective body. And,

> "The fact is that, for practical purposes, the House of Representatives and the Senate are regarded by their members as clubs—of which the Senate is, of course, the more exclusive. Each member of the House or Senate has his own standards and in a great many cases these standards are very high. But with almost no exception no member seeks to impose his standards on any other member. Once you are in the club, how you act is up to you, and no member wants to undertake to interfere in the conduct of any other member—partly, I suppose, because he does not want anyone else to interfere with him. This is unfortunate, I think, though perhaps natural and understandable."

(b) (continuing discussion Specification of Error No. 1, WAS THE APPELLANT DEPRIVED OF LIBERTY AND PROPERTY WITHOUT DUE PROC-

ESS UNDER THE FIFTH AMENDMENT.) All of the discussion above under (a) and which included a discussion of Specification of Error No. 2 is incorporated and adopted as being pertinent to this part of the argument. Counts 8, 9 and 10 required the appellant to name his business associates, his and their office addresses and the name under which the counselling group operated. The Supreme Court in the *Emspak* case, supra, noted that the "government" recognized that opprobrium resulted from claiming the privilege. Under the compulsion of the hearing to which appellant was subjected, he was not only exposed to opprobrium before a large number of people listening to and watching radio and television but he was deprived of his liberty to answer the charges made and to be represented by effective counsel.

A man's right to work is one of his liberties under the Fifth Amendment and to be deprived thereof without a fair trial has been heldto be a denial of due process. *Peters v. Hobby,* October Term, June 6, 1955, Vol. 99, No. 14, Adv. Rep. Supreme Court Law Ed., page 677.

The appellant was "deprived of life, liberty, or property, without due process of law,". Considering the fact that his testimony was compelled before this proceeding without the protections afforded in a fair hearing, and considering the fact that Counts 8, 9 and 10

involved the name of his then business associates, and the name of the group, and whether the group had an office in the same office that appellant worked in, it would appear clear that the opprobrium attached to the appearance of the appellant would have seriously injured his property rights and his business, if he had named his associates, the group, and their offices under these conditions. He and his associates would have been subjected to loss of reputation and public goodwill in their business, to say nothing of embarrassment and interference with their right to work. See *Peters v. Hobby, supra*. To run this risk in a proper hearing with due process is perhaps inevitable but to run it without due process protection is unfair and unreasonable and prejudicial.

Due process is a guarantee to a person of a fair hearing when he is being deprived of life, liberty or property. In the sense that appellant was being subjected to broadcasted hearing seen by a great number of people on television, an involuntary radio and newsreel appearance, where neither he nor his counsel could answer accusations made by the Congressmen or their Committee counsel nor make argumentative explanatory statements and where there was no equal opportunity, it might be argued that appellant's liberty included the right not to be exposed to such a public hearing; and not to have his private affairs examined into

at such a hearing.

(c) Appellant was being held to answer for capital and infamous crimes.

The infamy arising from broadcasted hearings has been argued heretofore, as has also the premise that legislative hearings such as appellant was subjected to are actually trials. Can it be possible that we have reached the point in this country where a legislative body can evade the Constitution and do what cannot be done before the courts?

Does it not gainsay the question to dispose of it with the statement that this provision of the Fifth Amendment only calls for a presentment or indictment before a Grand Jury, before a citizen can be put on trial before a court? Is not a court the only place where appellant should have been held to answer for the crime of espionage, and to give evidence needed for a Smith Act violation?

In appellant's case appellant was held to answer for an infamous crime, was accused without a fair hearing or a chance to protect himself. If a citizen cannot be held to answer for these crimes before a court without constitutional safeguards, how, then, can he be held to answer before a legislative committee?

SPECIFICATION OF ERROR NO. 3

(APPELLANT WAS NOT DIRECTED TO ANSWER QUESTIONS REPRESENTED BY COUNTS 2 and 8.)

Nowhere in the record is there a direction to answer the questions represented by Count 2. On the authority of the recent cases decided by the Supreme Court, to wit: *Emspak v. U. S.,* and *Bart v. U. S.,* and *Quinn v. U. S., supra,* it is now the law that Section 192 requires a criminal intent in a deliberate, intentional refusal to answer and that in the absence of a specific direction to answer, a "witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent . . ." *Quinn v. U. S.,supra,* page 573.

Elsewhere in this brief, page 24, it has been shown that as to the question represented by Count 8 there is a confusion as to whether the question was asked, the word "we" appearing in Count 8 taken from plaintiff's Exhibit 7 (R 25, 36) appears as "they" in defendant's Exhibit A-14-A (R 62) which was the voice tape recording. The record (R 62, 162) discloses the attempt of appellant to convince the trial court of the error involved.

Nowhere in the record is there a direction to answer the question represented by Count 8, even accepting the form in which it appears in plaintiff's Exhibit 7. (R 25 The question was asked, the privilege claimed, and the interrogation proceeded without direction to answer

the question.

SPECIFICATION OF ERROR NO. 4

(THE APPELLANT DID NOT WAIVE THE PRIVILEGE WITH RESPECT TO COUNTS 8, 9 and 10.)

Prior to the asking of the questions on which Counts 7, 8, 9 and 10 of the indictment are based, the appellant had discussed at length the nature of his occupation (R 108). After this discussion Congressman Clardy asked: (R 108)

> "May I ask you, who do you mean by 'we'? Is this something originated by the Communist Party as part of its program?"

After a colloquy, Congressman Clardy asked appellant the question: (R 110)

> "Who are the other people, then, when you use that word ('we') ('they') that are associated with you in this movement?"

Appellant refused to answer, claiming his privilege under the Fifth Amendment. Then Congressman Doyle said:

> "You are the one that volunteered that your present occupation was working with a group, and in my book that is a waiver of your privilege under the Fifth Amendment.
>
> But what is the name of the group?"

The appellant then said:

> "Sir, I believe that the Committee has sought

> to involve me in a trap on this question. Were I to decline to answer the question, certainly it is conceivable that I will be threatened with contempt charges, but, on the other hand, to answer it would lead to all sorts of other involvements, as I have tried to explain previously; so that in the circumstances I have no choice but to decline to answer the question, invoking my privileges under the Fifth Amendment not to bear witness against myself."

Obviously, up until the time Congressman Clardy injected into the discussion the suggestion that appellant's business was "something originated by the Communist Party", the appellant was attempting to answer questions concerning his present work and occupation. When the Committee sought to connect his business with the Communist Party and told him he had waived his privilege under the Fifth Amendment, what was the appellant to do? As the courts have said:

> "To sustain the privilege it need only be evident from the implications of the questions and the setting in which is is asked that a responsive answer or an explanation of why it can not be answered might be dangerous because injurious disclosure could result." *Hoffman v. U. S.*, 341 U. S. 479, 486.

One Congressman told the appellant that "in his book" he had waived his privilege. Chairman Velde told the appellant:

> "There is no possible way that you can incriminate yourself by an answer to that question."

Even the members of the Committee did not agree.

The appellant, a layman, had real cause for apprehension, and he had the right to protect himself by invoking his privilege not to testify as to facts which might tend to incriminate him, or which might be used as a further basis for the Committee to claim waiver. The appellant had willingly answered questions regarding his occupation. It was the Committee, by its injection of communism into the discussion which raised the question of whether the appellant should "stop short" and "determine that he will go no further", in the words of *McCarthy v. Arndstein,* 262 U. S. 355.

Considering the long answer of the appellant and his frankness in discussing his work, and considering its non-relevancy to the subject under inquiry and the insignificance of the answers which were already largely in the record (R 49, plaintiff's Exhibit 7) the words of Chief Judge Magruder of the First Circuit, in *Maffie v. U. S.,* (1954) 209 F. 2d 225, are particularly apt.

> "We would be reluctant to uphold a conviction for criminal contempt based upon a refusal to obey the district court's order so far as this insignificant residue is concerned; it would be too much like case of a tail wagging a dog."

There was obvious confusion on the part of the court and counsel for plaintiff in trying to apply the case of *U. S. v. Rogers,* 340 U. S., 367 (R171-174). The court did not recognize that appellant had not discussed incriminating matters but the court held that there was

a waiver anyway and that appellant was thus wilfully and contumaciously refusing to answer the questions represented by Counts 8, 9 and 10. It is clear that in the *Rogers* case the only reason there was held to be a waiver was because the witness had fully discussed incriminating matters.

There was absolutely nothing in the previous answers of the defendant concerning his work which involved incriminating matters. As a matter of fact, it is ironical to consider the court's statement that appellant had earlier waived his right not to answer these questions (R 167) because appellant had early in the hearing (R 87) said he was employed as a personal counsellor. Was the court suggesting that in order not to have committed waiver he should have refused to answer the question "How are you now employed, Mr. Jackins?"? Later, when appellant does refuse to answer Counts 1, 2, 8, 9 and 10, the trial court held him in contempt for not answering.

Appellant at this point incorporates the argument set forth hereunder in Specification of Error No. 10 concerning waiver and context (this brief, page 54-58).

SPECIFICATION OF ERROR NUMBERS 5, 6, 7, 8 and 9 (Counts 1 and 2 were within the privilege against self-incrimination under the Fifth Amendment and, in addition, were in context as to time and subject with dismissed counts; as to Counts 1, 2, 8, 9 and 10, appellant was exposed to waiver, and danger of perjury charges on matters

beyond his control;) THE REFUSAL TO ANSWER WAS JUSTIFIED.)

It is clear that the appellant had a reasonable apprehension that any testimony by him as to alleged activities could involve him in (1) waiving the privilege; (2) exposing himself to possible perjury charges, and (3) to furnishing evidence which might be used against him in a criminal proceeding.

Count 1 was based on the question: "Will you tell the Committee, please, briefly, what your employment record has been since 1935?"

Count 2 was based on the question: "How were you employed in 1948?"

Count 8 was based on the question: "Who are the other people, then, when you use the word ('we') ('they') that are associated with you in this movement?"

Count 9 was based on the question: "But what is the name of the group?"

Count 10 was based on the question: "Does the group that you referred to have an office with you in the same office that you work in?"

THE COURT DID DISMISS the following counts:

Count 3: "Did you hold an official position in 1948 or at any time prior thereto in Local 46 of the Interna-

tional Brotherhood of Electrical Workers?"

Count 4: "Now were you expelled from Local 46 of the International Brotherhood of Electrical Workers in 1948?"

Count 5: "Were you also expelled as Business Agent of the Building Service Employees Union sometime prior to 1948?"

Count 6: "Were you at any time expelled from Lodge 751 of the Aero Mechanics Union?"

Count 7: "Is this (work of personal counseling) something originated by the Communist Party as part of its program?"

Calendar dates "Since 1935" and "1948" coupled with employment stand out as the subject matter of undismissed Counts 1 and 2. This subject is related in context to dismissed Counts 3 to 7, inclusive. The questions in the dismissed Counts 3, 4, 5 and 6 followed undismissed Counts 1 and 2 and were a rephrasing (R 88, 95, 96) to elicit the answers desired but not obtained. The trial court said the questions in the undismissed Counts 1 and 2 were general and not dangerous to the appellant. The court is looking backward and substituting its own interpretation for the appellant's apprehension.

Examination of dismissed Counts 3, 4, 5 and 6 shows dates and jobs specifically. Dismissed Counts 3, 4 and

5 all mention the same year of 1948, the same year mentioned in undismissed Count 2; these dates and sequence certainly involve employment "since 1935," the date in undismissed Count 1. Similarly in dismissed Count 6 the question includes the phrase "were you at any time . . .". In fact, the record (R 157, 171) shows that the court did consider dismissing Counts 1 and 2, did dismiss Count 2, and then reinstated it. If a judge is confused about whether to leave a count in or dismiss it, then it is and was an unreasonable and impossible burden to lay on appellant. TO DECIDE THEY WERE NOT DANGEROUS QUESTIONS.

At this point appellant Jackins wishes to stress the possibility of his being exposed to perjury if the testimony in his answers should have been at variance with other testimony concerning THESE activities AND DATES, whether or not communistic (R 86). These things have occurred in recent cases and apprehension of them is not mere imagination.

With respect to the further context of Counts 1 and 2 to Counts 4 and 5, Count 4 asks if the witness was expelled in 1948 from Local 46 of the International Brotherhood of Electrical Workers. The court apparently reasoned that there was sufficient evidence connected with the Local 46 and the International Brotherhood of Electrical Workers in 1948 which did not include employment by the Communist Party to give appellant a basis for reasonable apprehension. Count 5

was also dismissed and it asks if appellant was expelled as Business Agent of the Building Service Employees Union "sometime prior to 1948." Count 6, also dismissed, asked "Were you *at any time* expelled from Lodge 751 of the Areo Mechanics Union?" (Emphasis added). The appellant is at a loss to understand why with reference to Counts 3, 4, 5 and 6, the court accepted the evidence to show that the appellant had a basis for reasonable apprehension although none of it indicates Communist Party employment, and yet refused to dismiss Counts 1 and 2, both of which involved questions the answers to which involved the same times—1948 and before.

Counsel for the Committee also reveals a basis for appellant's apprehension by the following (R 106):

"Mr. Tavenner. I think I should advise the witness that there has been heard in executive testimony before the Committee the witness Elizabeth Boggs Cohen, C-O-H-E-N, and the witness Leonard Basil Wildman, both of whom were heard on May 28, 1954, and both of whom identified you as at one time an active member of the Communist Party, Mr. Wildman having identified you as the organizer of a branch of the Communist Party while you were in attendance at the University of Washington. This is your opportunity, if you desire to take advantage of it, of denying those statements, if there is anything about them which is

untrue."

It is clear here:

(1) That the tie-in of this testimony goes back to a time "since 1935." Defendant's Exhibit A-13 sets forth the transcript of attendance of the appellant at the University of Washington by years. Is this not in and of itself a basis for the reasonable apprehension to be exercised?

(2) That the invitation to "deny those statements" is an invitation to make a positive statement on the basis of which a case of perjury could be charged or grounded; admissions or denials of the appellant to be used against him;

(3) By answering or attempting to answer (as happened on other questions) appellant would be charged with having waived his privilege;

The Court of Appeals for the 5th Circuit in *Marcello v. U. S. (1952)*, 196 F. 2d 437, stated the test to be used by the courts in determining whether an answer to a question could "possibly have a tendency to incriminate." The court said:

> "We come then to an examination of each of the six questions upon refusal to answer which the appellant stands convicted, applying to each the test which we understand to be prescribed by the Supreme Court in *Hoffman v. U. S.*, 341 U. S. 479,

71 S. Ct. 814, 95 L. Ed. 1118; vis.: In the setting in which it is asked and from a careful consideration of all the circumstances in the case, is it perfectly clear to the Court that the witness is mistaken, and that the answer cannot possibly have a tendency to incriminate him? (Citing many other cases.)"

Wigmore (*VIII Wigmore on Evidence*(*3d Ed.*) 354, Sec. 2260) states that "the orthodox and traditional doctrine (is) that the privilege covers facts which even 'tend to incriminate' and quoted from *Paxton v. Douglas* (1809), 16 Ves. Jr. 239, 242, 19 Id. 225, as follows:

> "If a series of questions are put, all meant to establish the same criminality, you can not pick out a particular question and say, if that alone had been put, it might have been answered . . . He is at liberty to protect himself against answering, not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer containing nothing to affect him except as it is one link in a chain of proof that is to affect him."

Wigmore also quotes from the classic statement of Chief Justice Marshall in Aaron Burr's trial, *Robertsons' Reports* I 208,244:

> "According to their (the prosecution's) statement, a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule

that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. While that remains concealed within his bosom, he is safe; but draw it thence, and he is exposed to a prosecution. The rule which declares that no man may be compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the Court can never know. It would seem, then, that a Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

It was said in *U. S. v. Fitzpatrick* (1951), 96 F. Supp. 491, 494:

"Where a witness, such as the Defendant here, has claimed the protection of the Fifth Amendment, and that in a setting in which he has been denounced by other witnesses testifying, as a communist, where testimony by other witnesses, if believed, shows that he has been active in organizing and directing a communist organization, where the statutes then in force make it a criminal offense to do such things and where prosecutions have been instituted against those who are charged with doing them, it seems to me to be clear that the Committee was put on ample notice that the Defendant apprehended that the answer to the question involved in this indictment would furnish information which could be used in the

prosecution of him in a criminal case under existing Federal statutes, and for that reason . . . declined to answer the questions. *P. Blau v. U. S.,* 340 U. S. 159.

"As the defendant cannot be found guilty of contempt in refusing to answer the question here involved . . . the judgment of the Court is that he is not guilty."

In *Patricia Blau v. U. S.,* 340 U. S. 159, the Supreme Court in a unanimous opinion acquitting stated:

"At the time the petitioner was called before the grand jury, the Smith Act was on the statute books making it a crime among other things to advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or help to organize any society or group which teaches, advocates or encourages such overthrow of the Government; to be or become a member of such a group with knowledge of its purposes. These provisions make future prosecution of the petitioner, far more than 'a mere imaginary possibility' . . . *Mason v. U. S.,* 244 U. S. 362, 366: she reasonably could fear that criminal charges might be brought against her if she admitted employment by the Communist Party or intimate knowledge of its workings. Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a citizen the privilege of remaining silent. The attempts by the Courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the begin-

ning. (Citing cases.)"

See also *Estes v. Potter,* 183 F. 2d 865, and *Alexander v. U. S.,* 181 F. 2d 480.

In *Hoffman vs. U. S.*, 341 U. S. 479, 486, the Court said:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a Federal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a Federal crime . . . But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer . . . It is for the Court to say whether his silence is justified . . . However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required ot be established in Court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence' . . ."

The *Notre Dame Lawyer, supra,* at page 232, suggests:

> " . . . some scope for refinement may, however, exist in the case of a witness who refuses not only to answer the question but to answer a further question, whether or not a truthful answer to the

> second question would incriminate him, or who claims the privilege simply because he foresees that if he does not, and puts his own sworn denial in opposition to the statement of the Committee informants, he will inevitably provoke a perjury prosecution. . . . the recent holding of the Third Circuit Court that no further 'background' incriminating possibilities need be shown by the witness other than such possibilities of incrimination as can be conjured up by 'ingenious' legal argument, citing *U. S. v. Coffey,* 198 F. 2d 438."

Liberal construction should be given the privileges conferred by the Bill of Rights in favor of a person claiming them. *Hoffman v. U. S.,* 341 U. S. 479, 486 (1951); *Counselman v. Hitchcock,* 142 U. S. 547, 562 (1892).

It is therefore clearly established that even though an answer would not support a conviction yet if it would form a link in a chain of evidence, the privilege may rightfully be claimed. *Blau (Patricia) v. U. S.,* 159 (1950); *Counselman v. Hitchcock,* 142 U. S. 547 (1892). And in *Hoffman v. U. S., supra,* the Court stated:

> "However, if the witness . . . were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result . . ."

In the recent ruling in *Emspak v. U. S.,* supra, page 592 to 593, the Court quoted with approval from *Hoffman v. United States,* supra, that it need only be evident from the implication of the question and the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result and also:

> "This Court has already made abundantly clear that such questions, when asked in a setting of possible incrimination, may fall within the scope of the privilege."

No authority has been found which would compel appellant to show employment by the Communist Party as required by the trial court (R 174-177).

SPECIFICATION OF ERROR NO. 10

(APPELLANT DID NOT WAIVE HIS PRIVILEGE, OR HIS RIGHT TO REFUSE TO ANSWER COUNTS 8, 9 AND 10)

The questions represented by Counts 8, 9 and 10 presented appellant with two risks: According to the Committee appellant waived his privilege (R 111); and there was a risk as to pertinency.

The questions were not pertinent in the sense that they could result in fruitful legislation or furnish legislative information of any value. At this point appellant incorporates his argument under Specification of

Error No. 12 discussing pertinency in this brief, page 61-69. At the trial counsel for appellant tried to pin down counsel for the Committee who was testifying on the purpose behind these questions and their pertinency. The witness kept retiring behind the need for more identification and the broad purpose of the Committee. (R 30, 34). The questions called for more and never ending identification, if identification were the purpose.

It is noted that the questions in Counts 8, 9 and 10, grew out of an answer by appellant concerning his employment and clearly not pertinent on its face (R 108). Thereupon the Committee, by its very next question (R 108), injected communism. Appellant was faced with the prospect of discussing his non-pertinent business, giving the names of his non-pertinent business associates, damaging them through publicity in that setting, denying communist connections. Would these answers have been considered not waiver? *Griswold,* supra, page (22-27, 59-60), discusses the plight of a witness faced by a question to answer concerning communism, and waiver resulting therefrom. It is submitted appellant did not waive his privilege or his right to refuse to answer by having answered on a matter (his employment) that was at the time not an incriminating matter. Appellant would have been faced with contempt for not giving this general "identifica-

tion" answer early in the hearing.

That the tactic of "more identification" was foreseen as artificial appears from the opinion of Judge Prettyman in *Barsky v. United States,* 167 F. 2d 241, 246 (D. C. Cir. 1948):

> ". . . In short, an unlimited right of 'identification' under the guise of investigation leads logically to a right of inquisition which is foreign and hateful to our traditions. Cf. *Board of Education v. Barnette,* 319 U. S. 624, 642 (1943): 'If there is any fixed star in our constitutional constellation it is that no official can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by words or act their faith therein'."

In *McCarthy v. Arndstein* (1922), 262 U. S. 355, the Court held that a witness has the privilege of stopping short at any place in his testimony whenever an answer may fairly tend to incriminate him. The Court stated (at page 359):

> ". . . if he has not actually admitted incriminating facts, he 'may unquestionably stop short at any point and determine that he will go no further in that direction,' . . . and it makes no difference in the right of a citizen to protection from incriminating himself that he has already answered in part, he being 'entitled to claim the privilege at any stage of the inquiry'."

In *Smith v. U. S.,* 337 U. S. 137, 150, the Court said:

> "Although the privilege against self-incrimination must be claimed, when claimed it is guaran-

teed by the Constitution . . . Waiver of constitutional rights . . . is not lightly to be inferred."

In *Rogers v. U. S.,* 340 U. S. 367, the Court held there had been a waiver because the witness, having freely answered self-incriminating questions relating to her connection with the Communist Party, could not refuse to answer other questions which did not subject her to a real danger of further incrimination.

In the case at bar, there was no waiver by the appellant of his right to claim the privilege. It is true that members of the Committee, attempting to confuse and trap him, told the appellant he had waived his privilege, but the fact is that there was no waiver.

In *Emspak v. U. S.,* supra, the court, citing from *Smith v. U. S.,* supra, reaffirms that a waiver of constitutional rights is not lightly to be inferred and, at page 591, states:

> ". . . And even if petitioner's 'no' answer were taken as responsive to the question, the answer would still be consistent with a claim of the privilege. The protection of the Self-Incriminating Clause is not limited to admissions that 'would subject (a witness) to criminal prosecution'; for this Court has repeatedly held that 'Whether such admissions by themselves would support a conviction under a criminal statute is immaterial' (quoting from *Patricia Blau v. United States,* 340 U. S. 159, 161, 95 L. Ed. 170, 172, 71 S. Ct. 223) and that the privilege also extends to admissions that may only tend to incriminate. (Citing *Hoffman v. United States* (U.S.) supra, Note 14,

341 U. S. at 486, 487; *United States v. Burr* (CC Va.) F. Cas. No. 14692e. And see Note 18, infra.). In any event, we cannot say that the colloquy between the committee and petitioner was sufficiently unambiguous to warrant finding a waiver here. To conclude otherwise would be to violate this Court's own oft-repeated admonition that the courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' (Quoting from *Johnson v. Zerbst,* 304 U. S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357. See also, e.g., *Glasser v. United States,* 315 U. S. 60, 70, 86 L. Ed. 680, 699, 62 S. Ct. 457, and *Smith v. United States,* 337 U. S. 137, 150, 93 L. Ed. 1264, 1273, 69 S. Ct. 1000.)

SPECIFICATION OF ERROR NO. 11

(THE COURT SUBSTITUTED FOR REASONABLE APPREHENSION AS TO COUNTS 1 AND 2, TOO GREAT A BURDEN ON APPELLANT TO KNOW ABSOLUTELY THAT THE COMMITTEE ONLY WANTED GENERAL INFORMATION.)

We incorporate as part of the argument herein the argument of appellant under Specification of Error No. 10 concerning waiver. Considering that claims of waiver by the Committee were invoked at every opportunity, it is clear that had the appellant answered Counts 1 and 2 the Committee, (and the trial court for that matter), would have claimed waiver again.

Appellant produced ample evidence of reasonable apprehension with respect to these Counts all set forth and discussed in the argument under Specifications

of Error 5, 6, 7, 8 and 9 and adopted as part of the argument under this Specification of Error.

It is clear that the answers to Counts 1 and 2 would have set forth dates and jobs going back to "since 1935", the period mentioned in Count 1, and "How were you employed in 1948?" which is the question in Count 2. These years as demonstrated by the evidence included alleged organizational work for the Communist Party at the University of Washington going back to "since 1935", and other alleged communist activities. The different jobs and employment in 1948 included those spelled out in dismissed Counts 3, 4 and 5. It cannot be doubted that the information which was sought by the Counts 1 and 2 gave a basis for reasonable apprehension. If appellant answered by denial, or gave answers inconsistent in details as much as 19 years old, and which was at variance with testimony of other witnesses before the committee as set forth in defendant's exhibits, would not the defendant have exposed himself to a perjury charge? (R 86)

Under the exposure tactics of the committee it has been suggested that this is exactly what the committee wants. Many of these investigations have led not so much to legislation as to prosecution for perjury.

Appellant's grounds for reasonable apprehension clearly show a relation in context as to time and subject matter between dismissed Counts 3, 4, 5 and 6

with undismissed Counts 1 and 2.

Other evidence has been amply covered elsewhere in the argument under Errors 5, 6, 7, 8 and 9.

Nor did the committee fairly apprise appellant that it only wanted him to answer generally what he did "since 1935." The court too readily shifted the burden to appellant (R 160). However, the court, after a discussion with counsel for plaintiff (R 156-157) seemed to feel that "If you once start, once start answering in a given subject in a given field, that then it is too late to claim the privilege after that time no matter where that may lead you . . ." and again (R 157) "That has been my impression of the law. Now if that, if that is right, if that position is correct, then I think I have got to dismiss Counts 1, 2 and 3."

But after further argument of counsel for plaintiff that the appellant could have made a general answer to an identification question, the court decided (R 160) that the appellant could have answered until the committee "pinpointed it to the point where it was obviously incriminating."

The Court did seriously consider dismissing Counts 1 and 2 (R 157, 171) but counsel for plaintiff (R 158) suggests a possible appeal dilemma. Counsel for appellant (R 159) argued to the court that "I think your Honor, the first reaction you had when you thought 1,

2 and 3 should be dismissed was based on that understanding, and I respectfully suggest that trying to read an interpretation of an employment record into the mind of a witness six, seven, eight months ago and say he should have told what he was, I think that is just a little bit rough. He had a reasonable thought and a reasonable apprehension."

We submit that it was too heavy a burden on appellant, and flies in the face of appearances to "know" that the committee only wanted a general, "safe, non-incriminating answer".

SPECIFICATION OF ERROR NO. 12 AND 13

(COUNTS 8, 9 AND 10 WERE NOT PERTINENT; ASKED TO FORCE WITNESS INTO WAIVER.)

Appellant urged non-pertinency by Motion to Dismiss (R 6) and by argument during the course of the trial. The motion was passed for argument during trial on the general issue (R 7), and was considered by the trial court at the time of general argument (R 120-127; 140-143). The court ruled: "I think almost every one of the questions on its face and particularly when taken in context with the questions preceding and following indicate almost without any further proof that they are pertinent . . ." (R 135).

On their face Counts 8, 9 and 10 are not pertinent. Furthermore, and contrary to the trial court's ruling,

the evidence in the record in context taken from the answer of the appellant on his occupation (R 108) conclusively shows that these counts were not pertinent. And the court also held that appellant had to answer these questions on another ground, namely, because he had waived his right not to further answer by having earlier told what his occupation was (R 167). (Discussed by appellant under Error No. 10, Page 54 of this brief.)

Title 2 U. S. C., Section 192, requires as a matter of law that the questions "be pertinent to the question under inquiry."

The Congressional Resolution does not authorize inquiry into the matters covered by the questions in Counts 8, 9 and 10. Plaintiff's Exhibit 2 (R22-23) is House Resolution No. 5 (R 19), of the 83d Congress and plaintiff explained (R 19) that the hearings were pursuant thereto and to Law 601, Section 121, 79th Congress, 2d Session. Said Law 601 as it pertains to the Committee reads as follows:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propoganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other

questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any such subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member." (Cited from page 793, Chapter 753, under Public Law 601 of the United States Code Congressional Service, 79th Congress, 2d Session, 1946.)

Only by the remotest stretch of imagination, and by granting an unjustifiable latitude to a presumption of legislative inquiry can it be said that the questions represented by Counts 8, 9 and 10 are authorized by the resolution. The plaintiff has not sustained any of the burden of proof to show the pertinency of said questions. As suggested elsewhere in this brief (page 69) if there ever was a presumption of pertinency on the first inquiry as to the Appellant's work at the

time he appeared before the committee it was dispelled by appellant's forthright answer (R 87, 108). Thus non-pertinency being established by the answer of the appellant (and if he had not answered he would have faced the threat of contempt charges at that point) it became the burden of the plaintiff to establish as a matter of law, and as a requisite under a criminal statute (Title 2, Section 192) to prove pertinency beyond a reasonable doubt. This plaintiff has totally and completely failed to do.

Nothing in the resolution allowed the committee a general power of making inquiry into the private affairs of the appellant and his associates without a further showing.

The law and classic statement attributed to *Kilbourn v. Thompson*, 103 U. S.-168, is:

> "Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."

The crime defined in the statute is a refusal "to answer any question pertinent to the question under inquiry." Appellant answered fully and freely regarding his occupation at the time he appeared before the

Committee. As far as he was concerned there was nothing incriminating. If he had refused to answer that question would a later court have held that the innocence of his answer had nothing to do with the pertinency? It has been so held in *U. S. v. Ormon,* 207 F. 20 148, 154. But with appellant once having answered showing the non-pertinency of the subject matter was not the right of the plaintiff terminated? Did not non-pertinency then become clear? Was not the matter then a private affair of the appellant? Is there no stopping point to how far an inquiry can go under the stated purpose of examining communism? Will there ever be a case of non-pertinency for an alleged ex-communist? If the matter is non-pertinent must he then answer as to all his associates in the business bringing them and their business into the opprobrium of appellant's public hearing? The record (R 121, 140) indicates that appellant argued to the court below this matter of non-pertinency but the court held that there had been a waiver and that it was not necessary to have incriminating matter before there could be a waiver (R 141). Further the court held that by an identification answer early in the hearing (R 87) the defendant by having told what his job was had waived his right not to answer further. Under this holding you are damned if you do and damned if you don't. In *Sinclair v. U. S.,* 279 U. S. 263 (1929) the court held that the government had sustained its burden to show perti-

nency before the lower court which had decided the question as a question of law, and the court further stated "the matter for determination in this case was whether the facts called for by the questions were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent to the question under inquiry'." In the instant case before the court can it be said as a matter of law that the questions represented by Counts 8, 9 and 10 could reasonably be said to be "pertinent to the question under inquiry."? It is submitted that they are not only not pertinent but they are ridiculously insignificant and more so because the address and name of the business were already in the files of the Committee and appeared in its Congressional Summons and citation (R 49) (Plaintiff's Exhibit 7).

"Pertinency" as a statutory requirement for the contempt conviction has not been proved beyond a reasonable doubt as to the questions reflected by Counts 8, 9 and 10. It has been held in *Bowers v. U. S.*, 202 F. 2d 447 (D. C. Circ. 1953), that the defendant should have been acquitted in the United States District Court for refusing to answer a question propounded by a Senate Committee investigating organized crime in interstate commerce where the government had not sustained the burden of proving the pertinency of the questions the witness had declined to answer:

The Circuit Court stated:

> "Our view is that, on its face, the question was not pertinent to that inquiry . . .
>
> "While it was the duty of the trial court to determine as a matter of law whether the question was pertinent, that determination could only be made from a factual showing by the government, since the question and the answer for which it called, standing alone, did not pertain to the subject under inquiry. We find in the record not the slightest showing by the prosecution that the nature of Bowers' business in Chicago in 1927 pertained to, or would shed any light upon, the activities of organized crime in 1951."

It is submitted that the reasoning of the Circuit Court in the Bowers case is applicable to Counts 8, 9 and 10. There is nothing in the record to relate 8, 9 and 10 to the subject under inquiry. In fact, the only thing in the record, to wit, is the answer of the appellant describing the nature of his occupation and this distinctly shows no pertinency.

It is necessary as a matter of law for the plaintiff to plead and show that the questions pertained to some matter under investigation. Certainly the business of the defendant in 1955 was not under investigation. There is no evidence in the record relating appellant's work to communist activities.

It was suggested that, when Bowers, supra, was being examined before the subcommittee, he did not assign lack of pertinency as his reason for refusing the answer questions, and so waived that defect. It was

held that the right to refuse to answer a question which is not pertinent is not a personal privilege, such as the right to refrain from self-incrimination, which is waived if not seasonably asserted; but that pertinency is an element of the criminal offense which must be shown by the prosecution. *Christoffel v. U. S.,* 1949, 338 U. S. 84, involved a prosecution for perjury before a Congressional Committee under a perjury statute which required that a "competent tribunal be present when the false statement is made." The Supreme Court stated, 338 U. S., at page 89:

> "We are measuring a conviction of crime by the statute which defined it. . . . An essential part of a procedure which can be said fairly to inflict . . . punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt. An element of the crime charged in the instant indictment is the presence of a competent tribunal . . ."

Christoffel's conviction was reversed because the government had not proved the presence of a majority of the Committee at the time of the alleged perjurious testimony. Christoffel did not raise before the Committee the point of no quorum. See also *U. S. v. Bryan,* 1950, 339 U. S. 323, *Bowers v. U. S.* ,supra.

It is interesting to note that in the Bowers case the court also stated that the presumption of innocence stayed with Bowers throughout the trial. The court rejected the thought that the questions were prelimi-

nary in nature and had they been answered would have led to and been followed by questions plainly pertinent for on that theory pertinency need never be shown in a prosecution under the statute. It could always be said the questions were preliminary. The indictment charged the seven questions were themselves pertinent; and the allegation was not sustained by a more possibility that they might have led to later relevant questions.

In the concurring opinion in the Bowers case, supra, by Circuit Judge Bazelon, he stated that the decision makes clear that no presumption of intent to violate the statute attaches to a naked refusal to answer, without a statement of the reason therefor, to "a question not shown to be 'pertinent to the question under inquiry'."

If there was a presumption of the validity of the questions regarding any work of appellant as an alleged ex-communist and his associates as having legislative evaluation then, after the answer as given in the instant case, is not said presumption dispelled and does not the burden of proof thereupon shift to plaintiff to prove that the insignificant answers to the questions represented by Counts 8, 9 and 10 did have legislative evaluation? Again, considering appellant's answer on his work, was not the information thereafter called for by the questions in Counts 8, 9 and 10 an inquiry into

personal and private affairs? Does this not meet the situations ruled upon in *U. S. v. Rumely,* 345 U. S. 41, not only as stated by the majority opinion but as to the additional supporting opinion of Justices Black and Douglas? The case held that the Committee had gone beyond its proper power in trying to compel testimony as to the identification of Rumely's contributors and that Congress intended that the Committee was to investigate only into direct lobbying. Mr. Jusice Black and Mr. Justice Douglas held in addition that the inquiry should be invalid on the constitutional ground that "Inquiry into personal and private affairs is precluded . . . And so is any matter in the strict sense of which no valid legislation could be had."

The questions represented by Counts 8, 9 and 10 were not of legislative importance. In *Sinclair v. U. S.* (1929), 279 U. S. 263, 292, the court was considering an indictment under 2 U. S. C. A. 192 for refusal to answer the question of a Congressional Committee. The court reviewed several cases and then stated:

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect to their personal and private affairs. In order to illustrate the purpose of the Courts well to uphold the right of privacy, we quote from some of their decisions.

"In *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377, this Court, speaking through Mr. Justice Miller, said (page 190):

"We are sure that no person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter into which that house has jurisdiction to inquire, and we feel equally sure that neither of these bodies possess the general power of making inquiry into the private affairs of the citizen.' And referring to the failure of the authorizing resolution thereunder consideration to state the purpose of the inquiry (page 195): 'Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority more than any other equal number of men interested for the government of their country. By "fruitless" we mean that it could result in no valid legislation on the subject to which the inquiry referred.'

"In Re *Pacific Railway Commission* (Circuit Court, N. C. Cal.) 32 F. 241, Mr. Justice Field, announcing the opinion of the courts, said (page 250): 'Of all the rights of citizens, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right all other rights would lose half their value.' And the learned Justice, referring to *Kilbourn v. Thompson,* supra, said (page 253): 'This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a Congressional Committee' . . .

"In *Interstate Commerce Commission v. Brimson,* 154 U. S. 447,. page 478, 14 S. Ct. 1125, 1134 (38 L. ed. 1047), Mr. Justice Harlan, speaking for

> the Court, said: 'We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses or can be invested with, a general power of making inquiry into the private affairs of the citizen. . . . We said in *Boyd v. United States*, 116 U.S. 616, 630 (6 S. Ct. 524, 29 L. ed. 746)—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of his life."

The constitutional restraints, contained largely in the Bill of Rights for the protection of the citizen are spelled out, while the right of Congress to carry on investigations for legislative purposes is not spelled out but is merely implied. To what extent does the implication become stronger than the actual article of the Constitution?

Appellant is appealing from a nominal sentence at considerable expense in order to protect his name and in order not to have a record of criminal conviction.

The entire Congress has not seen fit to intelligently study and debate motions for contempt. Plaintiff's Exhibit 7 shows no general Congressional discussion as to how appellant as a citizen was handled. If the Congress won't examine the hearing the Court must.

If, as was early held in *Marbury v. Madison, 1 Cranch*

137, at 163, by Chief Justice Marshall, the Supreme Court has the power to declare an act by Congress invalid if it were in fact unconstitutional, it would seem that the methods and actions of committees of Congress could be declared invalid.

In the famous case of *U. S. v. Burr,* (C. C. Va. F Cas No. 14692E), Chief Justice Marshall upheld the privilege even though President Jefferson and his executive branch of government were extremely anxious to convict Mr. Burr.

In the Federalist, No. 78, Hamilton has stated the principle of judicial supremacy which Marshall wholeheartedly adopted in *Marbury v. Madison,* supra:

> "The interpretation of the laws is the proper and superior province of the Courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to state its meanings, *as well as the meaning of any particular act proceeding from the legislative body.* If there should happen to be an irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute, the attention of the people to the intention of their agents." (Emphasis added)

In the *Federalist,* No. XLVII (1778) it is stated:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

And in *Meyers v. U. S.*, 272 U. S. 52 (1926), it is stated:

> "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote deficiency but to preclude the exercise from arbitrary power."

And Alexander Hamilton is quoted as saying:

> "There is no liberty, if the power of judging be not separated from the legislative and executive power."

And Hamilton, again, in the Federalist, No. LXXVIII (1778) states that the Constitution's retraints on the legislature: "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." He also said that the courts were designed to be "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits designed for their authority."

It is a concentration of power in the legislature when the judiciary rationalizes legislative pertinency and allows exercise of arbitrary power as in the instant case. And is it not voiding the constitutional duty of the court merely to say that the methods of the Committees constitute a question for the legislature to determine itself? Is it not the constitutional duty of the courts to check on the unfair practices of the legisla-

ture as well as to declare unconstitutional acts invalid?

Considering appellant's answer on his work, it is patently clear that the remaining questions on the subject were non-pertinent; that since appellant had not answered on incriminating matter he had not committed a waiver; that there can be no waiver on a non-pertinent matter.

The court below was too liberal in its presumption of pertinency as against protecting the appellant as a citizen, and granting him a higher presumption of innocence .

In *United States v. J. H. Rosenbaum,* Criminal No. 1722-51 (D. D C., November, 1953) the motives of the legislative committee were contended by the witness to have been harassment and that the questions asked were not asked in good faith to get information. The defendant was accused of perjury. The court acquitted him. It has been suggested by the *Notre Dame Lawyer,* supra, page 237, "that an arbitrary presumption of good faith could become a sanctimonious fraud, sanctioning unlimited prying into privileged personal matters."

CONCLUDING ARGUMENT

1. AS TO COUNTS 8, 9 and 10. Appellant earnestly suggests that the record conclusively shows that the committee when it asked these questions, at the end

of the hearing, was well aware of the claim of privilege consistently maintained by appellant and that their wild questioning of appellant as to espionage, et cetera, was part of a now well-recognized policy to use the committee for "exposure" purposes and as in this case to harass and harm a witness. Therefore, the committee had abandoned its legislative function and was surely attempting to harm or destroy a citizen with the assistance of television and radio publicity.

Dicta in the following outstanding case would not be dicta in appellant's case:

> "It may be that a Congressional Committee does not even have to have a legislative purpose but may conduct hearings solely to inform the public. So far as I am aware, no court has ever held that a Congressional Committee may compel the attendance of witnesses without having a legislative purpose. But that question I need not and do not decide in these cases."

U. S. v. Kleinman, dicta., 107 F. Supp. 407, 408 (D. D. C. 1953)

Where exposure becomes involved what happens to the guiding principles for appellant and later for a court which conducts the trial of appellant? Here, where it is clear that the committee had collectively embarked upon "exposure", and where from the nature of the questions in Counts 8, 9 and 10, the answers sought would be unimportant and could have no bearing on fruitful legislation, may not this court conclude that

the Committee in the instant case had abandoned its legislative function and thus lost the benefit of any presumption which the trial court seemed too willing to grant?

> ". . . we would have to be that 'blind' Court against which Mr. Chief Justice Taft admonished in a famous passage, Child Labor Tax Case, 259 U. S. 20, 37, that does not see what ('a')ll others can see and understand' not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the Congressional power of investigation." Mr Justice Frankfurter in

U. S. v. Rumely, supra, 345 U. S. 41, 44 (1953).

~~Mr. Justice Frankfurter in~~ *Wigmore,* supra, (discussing privilege) page 308, Vol. 8, 3rd Ed., states that:

> "The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby . . . The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachment of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized."

The courts should take cognizance of the odium attached to appellant's hearing.

2. Although there is repetition appellant is suggesting to the court that judicial unwillingness to give effect to the doctrine of separation of power has resulted, particularly in appellant's case, in enforcement and detective work of the executive branch of government being performed by the legislative committee.

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

Quinn v. U. S., supra, page 571

If the legislature is to be stopped where it violates constitutional provisions, the individual citizen must depend on the courts.

During the Army-McCarthy hearings in 1954 the President of the United States refused to permit a witness to testify concerning a meeting of various officials of the executive branch of the Government.

It is common knowledge also that when ex-President Truman was subpoenaed by the same committee

which examined appellant he refused to respond.

In June of 1953 Federal Judge Louis E. Goodman refused to submit to questions of the House Judiciary Subcommittee. This incident is reported in an article written by *Abe Fortas* in the *August 1953* issue of the *Atlantic,* entitled *"Outside the Law", page 42.*

Just how far can the courts allow the legislature to run in assault on rights of an individual citizen?

Mr. Justice Jackson in *Eisler v. United States,* 338 U. S. 189, 196 (1949) states: "I should not want to be understood as approving the use the Committee on Un-American Activities has frequently made of its powers but I think it would be an unwarranted act of judicial usurpation to strip Congress of its investigatory powers or to assume for the courts the function of supervising Congressional Committees. I should . . . leave the responsibility for the behavior of its Committee squarely on the shoulders of Congress."

Need this mean that the courts will be subservient to the legislative branch of the government in encroachment upon individual constitutional rights whenever met with the formulae of "national welfare", "national security", "communism", or "legislative investigations"? When appellant is publicly abused and where appellant is pounded with questions calling for refined thinking on matters which later on even confused the

trial judge, surely here is a situation calling for judicial enforcement of constitutional restraints in favor of a "mere" citizen. The court does not have to "strip Congress of its investigatory powers", or supervise Congressional Committees. Its duty under the Constitution is to enforce constitutional restraints against despotic and unfair methods used by other branches of the government. The presumption of legislative function and pertinency—not spelled out in the Constitution as to broad powers – should be held inferior to Constitutional restraints spelled out in the Fifth Amendment.

For the reasons set forth above, we respectfully petition that the judgment of the Court below be reversed.

Arthur G. Barnes
Attorney for Appel

APPENDIX "A"

Being excerpts from hearings before the Committee on Un-American Activities House of Representatives, Investigation of Communist Activities in the Pacific Northwest Area and in Evidence as Exhibits of the Defendant. A-1, A-2 and A-3.

Def's. Exhibit A-1—Pamphlet, Part 1—Elizabeth Boggs Cohen
Page 6003:

Mr. Wheeler: Do you recall the membership of the Communist Party in Seattle at that time?

Mrs. Cohen: When I became chairman, approximately 200; and during the two years I think it grew to about 1,200.

Mr. Wheeler: What 2 years was this?

Mrs. Cohen: At a guess, from 1936 to 1938.

Page 6004:

Mr. Wheeler: Are these the people you identify as functionaries within the party during that time?

Mrs. Cohen: Full-time functionaries.

Mr. Wheeler: During this period of time did you meet other individuals whom you can identify as members of the Communist Party?

Mrs. Cohen: . . . Other trade unionists were Merwin Cole from the Building Service Employees Union, . . . Jess Fletcher, Building Service Employees Union.

. . . Others that I met as Communists were . . . Harvey Jackins, youth leader; . . .

Def's. Exhibit A-1—Pamphlet, Part 1—Leonard Basil Wildman
Page 6027:

Mr. Wheeler: Will you explain your activities and official position with the YCL in Seattle from 1939 to 1941?

Mr. Wildman: . . .

Mr. Wheeler: Well, now, who were the other leading people in the YCL?

Mr. Wildman: . . . There was a young fellow by the name of Harvey--not Jackson.

Mr. Wheeler: J-a-c-k-i-n-s?

Mr. Wildman: Jackins, I think it was; J-a-u-l-k-i-n-s, or something like that.

Mr. Wheeler: J-a-c-k-i-n-s is the correct spelling.

. . .

Mr. Doyle: This was between 1939 and 1941.

. . .

Mr. Wheeler: Who was the organizer for the university branch? . . .

Mr. Wildman: Harvey Jackins was . . .

Page 6028:

Mr. Wheeler: . . .Who were the other members of the Northwest executive committee of the YCL?

Mr. Wildman: . . . Harvey Jackins.

Def's. Exhibit A-2—Pamphlet, Part 2—Barbara Hartle

Page 6067:

Mr. Kunzig: Mrs. Hartle, did you have occasion in your youth work to know a Carl Harvey Jackins?

Mrs. Hartle: I knew of Harvey Jackins as being involved in Communist youth work some years ago.

Mr. Kunzig: Mr. Chairman, this is Carl Harvey Jackins, of 6753 32d Avenue N.W., Seattle. We have already had two other identifications in executive session of this Mr. Jackins as a member of the Communist Party.

Page 6094:

Mrs. Hartle: . . . The Building Service Employees Union, Local 6, was for a long period completely Communist-dominated. High offices have been held in this union by . . . Jess Fletcher . . .

Mr. Kunzig: Now this union and all of these unions that you are discussing, you are mentioning in connection with the fact that they were affiliated with the Pacific Northwest Labor School; is that correct?

Mrs. Hartle: That is correct.

Def's. Exhibit A-3—Pamphlet, Part 3

Page 6232:

Mrs. Hartle: . . . When Harvey Jackins was expelled, I heard a discussion seriously held as to what his wife would do—go with him to the "enemy" or stay with the party. The Jackins have 3 or 4 children.

APPENDIX "B"

Being excerpts from the hearings as published by the Committee showing "setting" —t elevision , flash cameras, microphones, radio, protests, in evidence as Defendant's Exhibts A-4 and A-5.

EXHIBIT A-4

Page 6236:

Mr. Caughlin: In case I care to confer with Mr. Jackins or Mr. Jackins cares to confer with me, what is the situation as far as these microphones are concerned? Is our confidential conference going to be broadcast over it?

Mr. Tavenner. I think if you conduct your conversation discreetly, it will not be heard on the magnifying system. Otherwise you may move back a little.

I have just been told that if you signal it will be cut off completely, so you will be running no risk whatever.

Mr. Clardy. I think, Mr. Chairman, that it would be well to let the record show that the committee has asked those in charge of the radio and television to cut the volume down if they want to confer.

Mr. Velde. Yes; the record will so show.

EXHIBIT A-4

Page 6249:

Mr. Clardy: Mr. Chairman.

Mr. Velde: Mr. Clardy.

Mr. Clardy: I ask that he be directed to answer that question.

Mr. Velde: Just a minute. The witness has a right to confer with his counsel.

Mr. Clardy: I appreciate that, but he was asked where he was born and I don't think he should be entitled to filibuster, as he is trying to do.

Mr. Velde: Nevertheless, he should be given a reasonable time to confer with counsel.

Mr. Clardy: Counsel wouldn't know that as well as he would.

Mr. Velde: You know the rules, sir.

Page 6295:

Mr. Astley: I do.

I ask that the TV cameras be taken off.

Mr. Velde: According to the rules of the committee, the witness has the right to ask that he not be telecast during his particular hearing, so I now direct the cameras to be turned off the witness during the time that he testifies.

Proceed, Mr. Counsel.

Page 6296:

Mr. Astley: May I ask that the photographers go ahead and take their pictures and then leave so that they won't interrupt here? It is sort of nerve racking to have these lights in my eyes.

Page 6301:

Mrs. Kinney: Mr. Congressman, I would like to ask that these still pictures be not taken.

Page 6302:

Mr. Jackson: The Chair does not feel constrained to lay any restrictions on the press as to their activities. If it is the desire of the witness that she not be televised during the course of her

testimony, very well.

Mrs. Kinney: I don't mind being televised but I dislike very much having these still pictures taken, and I think I have a right not to have such photographs taken for anyone to have around them.

Mr. Jackson: The Chair has made the ruling. He will lay no restrictions upon the freedom of the press to operate within this hearing room.

Page 6307:

Mrs. Kinney: Congressman, I shall decline to state whether or not that document was written by me, and I do so.

Would you please have these people (referring to photographers) wait until I finish? It is a little bit disturbing. Besides they always take such ugly pictures, too; and I have seen what they do with pictures in McCarthyite proceedings; I have heard it over the television what they did with the pictures.

Page 6309:

Mrs. Schuddakopf: I do.

I don't want any television. I request not to have television.

Page 6310:

Mr. Jackson: Both television cameras will refrain from photographing the witness during the course of her testimony.

Page 6311:

Mr. Caughlan: May I request on behalf of my client that we also avoid this sort of stuff here. (Referring to photographers.)

Mr. Jackson: Is the request being made by the witness not to be televised?

Mr. Caughlan: No; it is not.

Mr. Jackson: What is the request? If counsel will advise his client, the client may make the request of the Chair.

Mr. Caughlan. Would you please tell the Chair that we would like to have these photographers out of the way, because they are extremely disturbing when you are being examined or anybody is being examined, I have noticed. They flash bulbs—

EXHIBIT A-5

Page 6325:

Mr. Plumb: Pardon me? Would you mind having these gentlemen take their pictures and then—

Mr. Velde: Yes, we will suspend for just a moment so that the still photographers may take their pictures so it doesn't interfere with the testimony.

Page 6336:

Mr. Henrickson: Would you instruct the photographers please to take their pictures and then stop when they have completed their work?

Mr. Jackson: I think they will stop when they have completed their work.

Mr. Henrickson: I would prefer that they would take their pictures not during the time I am testifying. It has a tendency to blind me momentarily.

Page 6367:

Mr. Caughlan: Excuse me, but can we have a little relaxing of this flash bulb situation here? It is very, very confusing. I believe you gentlemen aren't fair.

Mr. Clardy: Mr. Chairman, the counsel knows the rule full well.

Mr. Jackson: I will disregard any request not coming from the witness.

Mr. Moir: I request that, please. They annoy me very much.

Mr. Jackson: I will ask the press, to the extent possible and consistent to proper coverage of this hearing, to accommodate the witness to that extent.

Page 6368:

(At this point Mr. Moir conferred with Mr. Caughlan.)

(At this point Mr. Jackson left the hearing room.)

Mr. Scherer: Mr. Chairman.

Mr. Clardy: Mr. Scherer.

Mr. Scherer: These conversations on the part of counsel are obviously made in a studied contempt of this committee and in a studied attempt to defy the committee.

Mr. Caughlan: I protest this attack on the right of consultation.

Mr. Clardy: Will the counsel please subside? We will tolerate no nonsense from you. You have been filibustering and you will not be permitted to consult again. You know the question. You have been consulting and you are trying to delay the progress of this committee hearing. It will not be tolerated. Answer the question.

Mr. Moir: I am not going to be intimidated—and that man over there interrupted me.

Mr. Clardy: That will be enough. Answer the question one way or the other. It is pretty nearly 5 o'clock.

Mr. Moir: I have been here 4 days.

Mr. Clardy: Will you listen to me and answer the question?

Page 6369:

Mr. Moir: I want to consult with my counsel on this question.

Mr. Clardy: You have consulted too much already. Let us have an answer to that very simple question.

And, Miss Reporter, will you read it again so that there won't be any question about it?

(Question read.)

Mr. Moir: I would like to again—

Mr. Clardy: Just answer the question and make no statement, please, for once.

Mr. Moir: I would like to consult with my counsel on this question before I answer it.

Mr. Clardy: You consulted once and that is enough in the opinion of the Chair.

Mr. Moir: I was interrupted in that consultation.

Mr. Clardy: You consulted once at great length.

Mr. Moir: I would like to consult with counsel. I have got him here to consult with and I don't think you have a right to stop me from consulting with counsel.

Mr. Clardy: It is obvious that you are attempting to be contemptuous. I will give you just 30 seconds to consult with your attorney on a question that you have already consulted with him on in excess of a minute.

(At this point Mr. Moir conferred with Mr. Caughlan.)

Mr. Scherer: Mr. Chairman, it appears to me now that the lawyer is in contempt of the committee.

Mr. Clardy: He has been for a long time. Will you answer the question?

Mr. Caughlan: Sir, just a minute. If remarks are being—

Mr. Clardy: Now, Mr. Attorney, you know better than that. Will you answer the question, Witness?

Mr. Caughlan: Will the committee desist from making remarks about me?

Mr. Clardy: Mr. Counsel, if necessary, we will have you escorted from the room if you do not desist.

APPENDIX "C"

Being Defendants. Exhibits A-6, A-7, A-8, A-9 and A-10

Exhibit A-6—Photostat of P.-I. Article, Friday March 28, 1941—"Boeing Union Man Beaten in Red Fight".

Seattle Post-Intelligencer

FRIDAY, MARCH 28, 1941

BOEING UNION MAN BEATEN IN RED FIGHT

Inte Room Battle Brings Police And Sends Member of Aero Mechanics to the Hospital

By Robert C. Cummings

A union member accused f Communist activity. was eaten into unconsciousness esterday by several brother embers of the Boeing Aeronautical Mechanics' Union folowing an afternoon meeting f the local.

Two other members also were ruck and a third escaped being it only by agile "ducking" as he rift over Communism within the nion flared into violence.

At the night session, five policeen stood outside the meeting ape at the Senator Auditorium, nd there was no further violence, hough at one time tempers neared he boiling point inside the hall.

Most severely beaten was Harvey ackins, whom a special union trial oard had earlier found guilty of ommunist activities. Others struck ere Bob Sinclair and Karl Palm, he latter a suspended trustee of he union.

TWO SUSPENDED

Other developments were:

—Harvey W. Brown, international president of the International Association of Machinists who ecently removed Barney Bader as ocal president for "conduct unbeoming an officer," suspended Bader nd Palm as members. Palm is ader's father-in-law.

—Cullen Bates, chairman of the union's trial committee which reviously had returned "guilty" erdicts against Donald R. Keppler, hen a local vice president, and Hugo A. Lundquist, then business gent, said "the trial board will tay on the job until all the Communists on trial are cleaned out.' t still has fifteen cases to report.

—President Brown told the afternoon meeting that unless the rial committee were permitted to omplete its work the international xecutive council of the I. M. would take over."

—The trial committee recommended that Jackins be found uilty of Communist activity, that he be expelled as a member of the nion and that he be fined $5,000.

—Bader, who was not present at the afternoon session, was scorted out of the night meeting

(Continued on Page 9, Column 3)

Exhibit A-7—Photostat of P.-I. article, Saturday, October 25, 1947—"Auburn School Board Banned Union Agent as Red".

Seattle Post-Intelligencer

Sat., Oct. 25, 1947 5

Auburn School Board—

BANNED UNION AGENT AS RED

By Fred Niendorff

The belief that Local 6 of the Building Service Employes' Union was dominated by Communists played a large part in a decision of the Auburn school board to refuse to deal with the union, it was learned yesterday.

The board, headed by George Peterson, president, flatly declined to negotiate with Harvey Jackins, business agent for Local 6, last spring, when they ascertained he had been active in Communist Party agitation.

Jackins was one of the signers of a Communist Party nominating convention petition July 9, 1946. He is one of several business agents of Local 6 whom the Canwell legislative committee on subversive activities has identified as active in the Communist Party.

MET SHORT SHRIFT

Myron Ernst, business manager and secretary for the Auburn school board, said yesterday that Jackins appeared in behalf of service employes of six schools in the Auburn district but met short shrift when an investigation disclosed his Communist affiliation.

Ernst said the school board is now dealing directly with a grievance committee chosen by the school service employes.

Jess Fletcher, international vice president of the union, asserted in a recent public statement that the executive board of Local 6 has placed active Communist workers on the local's payroll as business agents.

"In most instances," he told the Canwell committee," the business agents devote most or much of their time to Communist Party activities."

He charged that the big Seattle Building Service Employes local has more Communists on its payroll than there are on the direct payroll of the Northwest District of the Communist Party.

Exhibit A-8—Photostat of P.-I. article, Friday, January 16, 1948 —"Electricians Drop Man From Union".

Seattle Post-Intelligencer
32 S Fri., Jan. 16, 1948

Electricians Drop Man From Union

Harvey Jackins, who had previously been expelled from two local unions for Communist leanings yesterday was turned out of Local 46 of the International Brotherhood of Electrical Workers.

"Jackins was expelled by the executive board because it was proved beyond doubt that he is a Communist," Bill Gaunt, secretary of the local, said. "We refuse to tolerate the presence of Reds in our union."

Jackins was ousted as a business agent of Local of the Building Service Employes Union on November 26 by Arthur I. Hare, trustee fo the union, which had been leftist dominated.

He also had been expelled from Lodge 751 of the Aero-Mechanics Union. The board of the American Federation of Labor Electrical Workers gave Jackins three hearings to allow him to prove that the charges against him were false.

He was told that if he signed an affidavit denying that he was a Communist, he would receive special consideration from the union, Gaunt said. He declined.

At the union's regular membership meeting Wednesday night, attended by more than 500 members, no protest was offered when X was announced that Jackins was to be expelled from the union.

Jackins had been prominently identified with leftist activities in this area. At the Lake Washington moorage hearings in July, 1945, he represented the East King County Communist Club in speaking for the proposed moorage.

Exhibit A-10—Photostat of Seattle Times article, November 26, 1947—"5 Ousted from Posts in Union".

THE SEATTLE TIMES
WEDNESDAY, NOVEMBER 26, 1947.

5 OUSTED FROM POSTS IN UNION

Three business representatives and two office workers of Local No. 6, Building Service Employes' Union (A. F. of L.), were fired from their jobs today in the program to rid the union of communistic activities.

Arthur Hare, who was appointed trustee of the local recently after three officers were suspended, said William Ziegner, Harvey Jackins and Al Barnes, business representatives, and Olga Schock and Martha Imsland, office workers, had been dismissed.

The five were not suspended from membership in the union, but merely removed from their jobs, Hare said. Jackins was expelled in 1941 from District Lodge No. 751, Aeronautical Mechanics' Union (independent), in a clean-up of officers and members accused of communistic activities.

No action was taken regarding Thomas C. Rabbitt, former state senator, who was accused of communistic activities during a hearing conducted by William McFetridge, international president of the union.

Rabbitt is on the union rolls as an organizer for the Northwest District Council, Hare said, adding that he had been directed by McFetridge only to handle the affairs of Local No. 6. Rabbitt, however, has been instructed to keep out of the local's offices.

Hare, secretary of San Francisco Local No. 250 of the union, said successors to the three business representatives had not been chosen. He said contract negotiations of the local would go on with the employers as usual.

Exhibit A-9—Photostat of P.-I. article, Saturday, April 5, 1941—"Brown Urges Union to Act on Red Issue"

Seattle Post-Intelligencer
SATURDAY, APRIL 5, 1941

BROWN URGES UNION TO ACT ON RED ISSUE

nternational I. M. A. President Calls on All Members to Attend Mass Meet Tomorrow

Charging that Communists re "challenging the laws and olicies of the Intenational ssociation of Machinists" to ause strife in the Aeronautical Mechanics Union, Harvey . Brown, I. A. M. international president, yesterday rged all of the thousands of Seattle members of the Aeronautical Mechanics to attend mass meeting tomorrow hen reports on trial board nvestigation of Communist harges against various members will be heard.

The meeting will be at 10:30 a. in the Civic Auditorium. Investigations of fifteen union members, whose cases still remain before the trial board, will be reported.

REPORT FINDINGS

The appeal to the membership to ttend the meeting was contained n the following signed statement ssued by Brown last night:

"Communists challenging the laws and policies of the International Association of Machinists is the issue that has caused strife and division within the Aeronautical Mechanics Lodge No. 751.

"The committee investigating charges of Communist activities preferred against certain members will report their findings and recommendations at a meeting to be held at 10:30 a. m. Sunday at the Civic Auditorium.

"Not only members of organized labor but the public generally throughout the Seattle area have their eyes on the International Association of Machinists.

"Aside from membership responsibility every member of Aeronautical Mechanics Lodge No. 751, I. A. of M., is charged with a patriotic duty to cooperate in ridding our union of subversive elements whose teachings are a challenge to our democratic institutons.

"I urge all members of Lodge No. 751 to attend the meeting in the Civic Auditorium and remain until the business is transacted."

EXPULSION URGED

The trial board already has recommended that Harvey Jackins, Aeronautical Mechanics member, be expelled from the union and fined. The action was taken after the board investigated charges

(*Continued on Page 2, Column 2*)

APPENDIX "D"

Being Excerpts from Defendant's Exhibit A-11, page numbers of original report as shown on left.

Un-American Activities Washington State

1948

Report of the Joint Legislative Fact-Finding Committee on Un-American Activities

Preface

The first public hearings were held in the 146th Field Artillery Armory, Fourth and Harrison, Seattle, from January 27 to February 5, inclusive.

93

Q. Do you know Harvey Jackins?

A. I know Harvey Jackins very well, yes. He is a member of the Com-

94

munist Party. He is former business agent of Building Service Local 6. I have known him for a period of about eight to ten years. He was a member of the Communist Party and I appeared at the Building Service Local 6 trial and so stated there under oath, and I understand that he has since been removed from several unions, Local 6 and another union, as I understand, because of his Communist activities.

Q. Do you know Merwin Cole?

A. I knew Merwin Cole probably ten or twelve years. He also was of course a member of the Communist Party, and I learned that he has been a member for approximately—at least fifteen years after I became a member of the Communist Party and I so stated in the Local 6 Building Service, A. F. of L. that is, union trial, and as a result he and—he was—he and the president—he was the secretary-treasurer and Ward Coley, were all removed from leadership in that union.

509

MR. WHIPPLE: That's G-a-r-f-i-e-l-d.

"A. —was listed as the instructor for 'Peoples and Cultures,' and the last instructor mentioned on this page is the same Dr. C. H. Fisher, the Educational Director of the Pension Union, who was scheduled to teach 'Social Security in Washington,' and the pamphlet lists this as being, quote, 'A fighting course to provide up-to-date information for those concerned with social security in the State of Washington,' unquote.

On page four of the bulletin, Burt MacLeech is listed to teach 'Effective Speaking and Union Meeting Procedure.' Page five lists the name of Jerry O'Connell as coordinator for the subject 'Labor's Political Role in 1948' and states that this subject, quote, 'Will tackle both ideological and organizational problems which labor must solve,' unquote. Dr. Ralph Gundlach from the University of Washington is scheduled to teach the subject 'Analysis of Employer Propaganda.' The subject of 'Northwest Labor History' was scheduled to be taught by John Daschbach and William J. Pennock, President of the Washington Pension Union. This announcement said this class, quote, 'Would bring together the rich, inspiring story of the militant and progressive struggles of labor in the Northwest,' unquote. On this same page they announce that at the coming spring term of the school, the subject 'Trade Union Organizational Problems' will be taught by Jackins. Incidentally, I understand this is the same Harvey Jackins who was dismissed from Local 6 of the Building Service Employees Union for Communistic activity, and was recently expelled from the Electrical Workers Union for the same reason.

513

munist Party for the years 1946, 1942, and 1936, and I would like to offer these petitions, nominating petitions of the Communist Party, into the record, and dictate into the record the names of those persons whose names are found on the nominating petitions, whose names have been introduced into the testimony of this hearing as being members of the Communist Party.

First, the name of Al Bristol; Harold Brockway; Marian Camozzi—

CHAIRMAN CANWELL: Mr. Whipple, I think that you might as well sit down and be comfortable while you read this material.

MR. WHIPPLE. Thank you, sir.

Babba Jean Decker, formerly Babba Jean Sears; Ralph Hall; Barbara Hartle: a Mrs. Hiller, whose first name is not identified; Henry Huff, the present Northwest Executive Secretary, District Organizer, of the Communist Party; Harvey Jackins; Burt Nelson; Andrew Remes; Lowell Wakefield; and Mrs. William Ziegner, Sr.

I would like to introduce these names into the record, together with the photostatic copies of the official nominating petitions of the Communist Party for those three years mentioned.

567

By May the 4th, a total of thirty-eight men had been expelled from the Boeing union, with twenty-one cases pending. Richard Frankensteen and Wyndham Mortimer left for Los Angeles on May the 2nd. Housecleaning of the union had been completed by May the 18th and the suspension lifted. Two days later, however, a group of C.I.O. organizers, directed by Harvey Jackins from a sound truck, appeared at the entrance of Boeing plant two. A near riot ensued as they were driven from the plant. Jackins announced plans for a return engagement at the plant for the following Tuesday, but upon law-enforcement officers appearing upon the scene and an announcement by the Prosecuting Attorney and Chief of Police Sears that measures would be taken to prevent further disturbances, nothing more was done by the rebel faction.

98

Q. Do you know a man by the name of Harvey Jackins?
A. Yes, sir, very well.
Q. Were you ever solicited to join the Communist Party by him?
A. I was.
Q. Where and when?
A. At the same place. Not at the same time, though.
Q. What year was that, if you remember?
A. Approximately 1939.
Q. What was the occasion?
A. Just met him in the hall and he solicited my membership—asked me t join the Party. At that time I was active in the Aeronautical Mechanics Unio and it seemed that my membership was desirable.

418

Q. And identify each one.
A. Harold Brockway was the Executive Secretary of the Workers Alliance; William K. Dobbins was a board member; Wallace W. Webb was a board member; Jim Haggin, H-a-g-g-i-n of Spokane was the Vice—State Vice President of the Workers Alliance and also a board member; Art Furnish, from Spokane, also, F-u-r-n-i-s-h Furnish, from Spokane, was also a board member; Harvey Jackins, J-a-c-k-i-n-s, was also a board member.

Q. Is that the Harvey Jackins who subsequently was expelled from the Boeing Aeronautical Employees Union?
A. That I can't tell you, because I am not acquainted with that particular case of Boeing Aeronautical—

Q. Is that the Harvey Jackins that until recently was connected with the Building Service Employees Union?
A. It is my understanding that this is the same person.

Q. Now you can testify of your own personal knowledge as a member of the Communist Party, at this time that each of these were Communists at that time, and that you have sat in closed Party meetings with them.
A. I can.

423

Q. Now did you ever sit in any meetings with the King County Central Committee of the Communist Party?
A. I have.
Q. Who composed this committee, Mr. Armstrong?
A. I can't give you a complete roster of the committee, because again time intervenes, this was seven or eight years ago, a good many of the people that met there I knew simply by their first name or a nickname, but I'll read off to you those that I know and can actually identify.
Harold Brockway at that time was the chairman; Al Bristol, B-r-i-s-t-o-l; this Mrs. Reardon that we've mentioned before; John Laurie, L-a-u-r-i-e; Harvey Jackins:

APPENDIX "E"

(Being Smith Act defendants mentioned in Defendant's Exhibits A-1 to Defendant's Exhibit A-5, inclusive, and Canwell Hearing Defendant's Exhibit A-11.)

Convicted Smith Act Defendant Hartle mentioned in Defendant's Exhibit A-1 on pages 6003, 6004, 6018, 6030, 6032; mentioned or testifying on all pages of Defendant's Exhibit A-2; mentioned in Defendant's Exhibit A-3 on pages 6127 to 6233; mentioned in Defendant's Exhibit A-4 on pages 6235, 6268, 6269, 6275, 6284, 6285, 6294, 6299, 6300, 6310, 6313; mentioned in Defendant's Exhibit A-5 on pages 6320, 6325, 6326, 6328, 6331 to 6333, 6343 to 6357, 6367, 6375, 6377.

Convicted Smith Act Defendant Terry Pettus mentioned in Defendant's Exhibit A-1 on pages 5982 and 6004. Mentioned in Defendant's Exhibit A-2 on pages 6074 and 6075. Mentioned in Defendant's Exhibit A-3 on pages 6141, 6177, 6209, 6211, 6214, 6216.

Convicted Smith Act Defendant Paul Bowen mentioned in Defendant's Exhibit A-3 on pages 6141, 6171, 6209, 6217.

Convicted Smith Act Defendant Henry Huff mentioned in Defendant's Exhibit A-1 on pages 5988, 6003, 6004, 6030. Mentioned in Defendant's Exhibit A-2 on pages 6062, 6065, 6069, 6086, 6101, 6109. Mentioned in Defendant's Exhibit A-3 on pages 6130, 6143, 6145 to 6150, 6152, 6158, 6191, 6197, 6203, 6204.

Convicted Smith Act Defendant John Daschbach mentioned in Defendant's Exhibit A-1 on pages 6005, 6030. Mentioned in Defendant's Exhibit A-2 on page 6086. Mentioned in Defendant's Exhibit A-3 on pages 6177, 6216, 6217. Mentioned in Canwell hearings, Defendant's Exhibit A-11, Appendix "D," on page 509.

Acquitted Smith Act Defendant Karly Larsen mentioned in Defendant's Exhibit A-1 on page 5986 and 5987. Mentioned in Defendant's Exhibit A-2 on pages 6099, and 6107 to 6109. Mentioned in Defendant's Exhibit A-3 on pages 6186, 6190, 6191 and 6216.

APPENDIX "F"

Being excerpts from an article by William T. Gossett, Vice-President and General Counsel of the Ford Motor Co., in 38 A.B.A.J 817 entitled: "Are We Neglecting Constitutional Liberty? A Call to Leadership."

"There is considerable doubt, I think, as to the legitimacy of the purpose of influencing public opinion (818).

• • • •

"Congressional investigations which are launched for the purpose of inquiring into questions of personal conduct, closely resemble the inquisitorial functions of our grand juries. As all lawyers know, in any investigations or grand jury proceeding, it is inevitable that many fruitless lines of inquiry will be undertaken. And so some false leads must be pursued. The inviolate rule of secrecy in a grand jury proceeding is predicated upon the urgent necessity of protecting the good name of the many innocent persons who must be questioned and who, through no fault of their own, might be under suspicion before a determination is made as to which, if any, of those under investigation will be subjected to indictment or other action.

"But no such protection is accorded to those who are so unfortunate as to be required to testify before many of our Congressional committees. Not only are witnesses interrogated in public, but they are denied basic constitutional safeguards which in a court proceeding are granted as a matter of right, even to one who, after investigation, has been accused of a crime. The constitutional safeguards to which I refer, of course, are the rights of the accused to be informed in advance of the nature of the charges against him; his right to be confronted with the witnesses who testify against him, and to subject them to cross-examination; his right to compulsory process for obtaining witnesses in his favor; his right to be represented by counsel; and his right to testify then and there in his own defense.

"Congressional investigations which delve into matters of personal conduct assume the aspects of a trial and thus abridge the rights of individuals, guaranteed by the Constitution. And there have been cases in which, as a result of the publicity of committee hearings, witnesses have been exposed to such penalties as dismissal from their jobs, loss of pension payments, character assassination and injury to their reputations.

"Those who would defend such practices are quick to point out that a witness before a Congressional committee is not in jeopardy—that is, he is not subject to a jail sentence by the

committee in connection with the matter about which he is being interrogated. But the argument ignores the fact that the committee has the power to sully a man's reputation unmercifully, and to many men a good name is fully as important as merely being out of jail. Moreover, a committee can send a witness to jail for refusal to answer a question--even one which a Court might not require him to answer.

"The practices of investigating committees thus are without proper standards. Persons are now subpoenaed before such committees and afforded no right to counsel. Although they often are subjected to the most searching cross-examination themselves, they are denied the right to cross-examine those who testify against them. If they are so-called hostile witnesses, they often are not even accorded the right to make a statement—prepared or otherwise; and if the behavior of the witness is such as not to please the committee or some of its members, he can be summarily punished.

"Some committee members seemingly have viewed the committee as a final court of justice sitting in judgment on the conduct of individuals appearing before the committee. Thus they usurp the judicial function. On the other hand, committee members can and do slander witnesses with impunity, secure in the knowledge that there can be no retaliation in court.

• • • •

"In such an inquiry there is no assumption that the individual is innocent until proved guilty. There are none of the safeguards of a trial to which, by the Constitution and the law, each man is entitled. Instead, there is a type of trial by public opinion, a pillorying of individuals not accused of crimes—of individuals only suspected of being engaged in or knowing something about some improper activity. And the rules are the same whether the witness is innocent or guilty.

". . . It must be apparent that if such tactics are permissible with respect to suspected criminals, they may also be permissible with respect to persons who hold views in conflict with those of the overwhelming majority. Thus, we run the risk that we might all become guilty of imposing 'tyranny of the prevailing opinion and feeling' which John Stuart Mill believed so serious a danger to democracy." (819-20)